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SOVEREIGNTY AND ILLIBERALISM

ANGELA R. RILEY

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SOVEREIGNTY AND ILLIBERALISM

Angela R. Riley[*]

Abstract

Liberalism struggles with an ancient paradox. That is, it must navigate the sometimes treacherous course between individual autonomy and pluralism's accommodation. In this article, Professor Riley argues that this philosophical tension has manifested in very concrete intrusions on American Indians' tribal sovereignty. On the one hand, tribal sovereignty guards Indian nations' inherent right to live and govern beyond the reach of the dominant society. This "measured separatism" embodies liberalism's commitment to the accommodation of pluralism. On the other hand, however, critics charge that imposing liberalism onto Indian nations is necessary to prevent infractions of individual rights by tribal governments. For these scholars, individual autonomy must always be preferenced above Indian nations' continued existence.

Scholars concerned with illiberal practices perpetrated by tribal governments are increasingly calling for an expansion of federal civil rights laws into tribal communities. But these urgings are rarely accompanied by a thorough and thoughtful analysis of American Indian tribal sovereignty. In fact, most scholars writing in this area fail to acknowledge that expansion of such laws into tribal communities would potentially eviscerate tribal sovereignty and wipe out Indian differentness altogether. Accordingly, based on a detailed examination of tribal sovereignty – both as embodied in American law and as experienced by Indian nations "on the ground" -- Professor Riley concludes that the United States' own theory of Indian sovereignty supports the perpetuation of Indian nations' autonomous existence. Further, it mandates that internal tribal decisions regarding Indian culture and tradition be left to Indian tribes, even when those decisions are inapposite to Western liberal ideals.

A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good . . . [L]liberalism . . . tries to show both that a plurality of conceptions of the good is desirable and how a regime of liberty can accommodate this plurality so as to achieve the many benefits of human diversity.

--John Rawls[2]

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INTRODUCTION

Liberalism has a problem.[3] Individual autonomy is its critical core, but pluralism remains a prominent tenet.[4] This means that liberalism must navigate the sometimes treacherous course between individual rights and pluralism's accommodation. Liberalism is challenged by this endeavor, particularly when individual rights are exercised in communities that espouse illiberal[5] conceptions of the good.

This philosophical tension has manifested in very concrete intrusions on American Indians' tribal sovereignty. On the one hand, tribal sovereignty guards Indian nations' inherent right to live and govern beyond the reach of the dominant society. This "measured separatism"[6] embodies liberalism's commitment to the accommodation of pluralism. On the other hand, however, critics charge that imposing liberalism onto Indian nations is necessary to prevent infractions of individual rights by tribal governments.[7] For these scholars, individual autonomy must always be preferenced above Indian nations' continued existence.

Indian tribes are both symptom and solution within this philosophical debate. But they have largely been either absent from the illiberalism literature[8] altogether, or have been afforded only half-hearted consideration. Thus, this article examines, for the first time, the role of Indian tribal sovereignty in situating Indian tribes in this larger dialogue.

Indian differentness has long been a subject of concern by the dominant society.[9] Of particular import is the fact that Indian tribes are

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[2] JOHN RAWLS, POLITICAL LIBERALISM, 303-304 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

[3] *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 15-18 at 974 (1978) (referring to the "ancient paradox of liberalism" in the context of discussing the conflict between freedom and equality).

[4] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1887 (1987). *See, also*, John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J.LEGAL. STUD. 1, 4-5 (1987).

[5] For a definition of "illiberal" *see infra* PART II.

[6] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14, 16 (1987) (asserting that the central thrust of federal Indian law has always been to create a "measured separatism.").

[7] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 167 (1995). For purposes of this paper, I limit my analysis to the tribal government's authority over its own members. Tribal authority over non-members is beyond the scope of this work.

[8] Throughout this piece, I use the term "illiberalism literature" to refer to the works that caution against or criticize liberal society's accommodation of illiberal groups.

[9] *See, e.g.*, The Major Crimes Act, 18 U.S.C.A. § 1153, passed in large part in response to the case of *Ex parte Crow Dog*, 109 U.S. 556 , 571 (1883), in which the Supreme Court held that the tribe had exclusive jurisdiction over a crime occurring by an Indian in Indian Country. *Crow Dog* caused much controversy, because the penalty imposed by the Sioux for Crow Dog's murder of Spotted

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the only governmental bodies within the United States that are not bound by the U.S. Constitution.[10] Because of this, Congress extended a portion of the Bill of Rights to Indian tribes by statute in the form of the Indian Civil Rights Act (ICRA) in 1968. But passage of the ICRA has not alleviated concerns over potential violations of civil liberties by tribal governments. In fact, these concerns were heightened twenty-seven years ago with the Supreme Court's ruling in *Santa Clara Pueblo v. Martinez*,[11] which limited federal court review of ICRA claims to habeas corpus petitions. As a result, the Court upheld the Pueblo's authority to maintain its own membership rules, even though they discriminated against the children of women, but not men, who married outside the Pueblo.[12]

Today, scholars who critique the (sometimes merely perceived) illiberal actions of tribal governments point to *Santa Clara Pueblo*, in particular, to bolster their arguments for increased state intervention in the inner workings of illiberal groups. Now it appears that the judiciary may be taking heed. Though *Santa Clara Pueblo* has never been overruled, there is evidence that federal courts are growing increasingly concerned over alleged civil rights violations by tribal governments and are seeking ways to intervene under the ICRA,[13] even though the issue of federal court review of non-habeas ICRA claims has long been settled.[14]

The extent to which liberal societies ought to accommodate illiberal groups, if at all, has been discussed extensively in academic literature.[15]

Tail was based on the traditional way. The families involved agreed to a payment of $600, eight horses, and one blanket from Crow Dog's people to Spotted Tail's people. Reformers were outraged and succeeded in getting Congress to extend federal criminal jurisdiction over Indian Country.

[10] *See infra* PART II.

[11] 436 U.S. 49 (1978).

[12] *Id.* (holding, *inter alia*, that there was no jurisdictional basis upon which the federal court could review an Indian Civil Rights Act claim unless it involved a habeas corpus action).

[13] *See, e.g.*, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901 (2d Cir. 1996) (holding that permanent banishment ordered by tribal council was a punitive and not civil sanction, and as a criminal sanction was a "sufficiently severe restraint on liberty" to justify federal habeas review under ICRA); *Quair v. Sisco*, 359 F. Supp. 2d 948, 971 (E. D. Cal. 2004) (following *Poodry* and holding that disenrollment and banishment are equivalent to "detention" such that federal habeas review under ICRA was authorized).

[14] *Santa Clara Pueblo*, 436 U.S. at 61.

[15] *See, e.g.*, KYMLICKA, *supra* note 7, at 167 (arguing that liberalism need not impose its values on illiberal minority groups and can tolerate illiberal values to the extent they are not inconsistent with respect for individual autonomy); Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 939 (2002) (examining how liberalism does not treat all illiberal groups consistently, leading in some cases to destructive effect, but in others to supportive effect); Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, 12 J. CONTEMP. LEGAL ISSUES 661 (2002)

But in this article, I seek to address and fully examine another question concerning illiberalism, one related directly to American Indian tribes. That is, to what extent are Indian tribes free to govern illiberally? This question can be broken down further, with both a descriptive and normative component. As a descriptive matter, what is U.S. law and policy regarding illiberalism within its "domestic dependent nations"?[16] And, as a normative matter, how ought Indian tribal sovereignty inform U.S. law's reaction to illiberal practices carried out by these extra-Constitutional governments?[17] Answers to the questions raised here are critical, not only to Indian nations' continued existence, but also to American democracy. And they must be confronted. With over 500 federally recognized Indian tribes in the United States, conflicts between individual tribal members and their tribal governments will continue to arise. Correspondingly, the scope and extent of federal power to intervene in purely intra-tribal disputes must also be addressed.

I suggest that well-settled principles of federal Indian law and the history of Indian tribal sovereignty situate Indian tribes beyond the bounds of a standard illiberalism analysis. American Indian tribes do not neatly fit into existing legal paradigms because they inhabit a strange, sovereign space in the U.S. legal system, one which they alone occupy. Thus, a more complete analysis of tribes as illiberal actors must address Indian nations' sovereign status, a status that may alternately empower or limit their capacity to live and govern illiberally.

I do not always agree with the outcomes reached by tribal courts and tribal council in these matters.[18] But I nevertheless advocate against further expansions of the ICRA or similar laws that would impede tribal self-governance for reasons both positivist and normative. First, hundreds of years of federal law – embodied in treaties, the Constitution and Supreme Court jurisprudence – coupled with Indian nations' own

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(concluding that true liberalism requires honoring liberal values at all levels and in all categories, whether individual/group, majority/minority, or cultural/political); Mark D. Rosen, *"Illiberal" Societal Cultures, Liberalism, and American Constitutionalism,* 12 J. CONTEMP. LEGAL ISSUES 803, 806 (2002) [hereinafter *"Illiberal"*](arguing that a true liberal state should not only tolerate illiberal groups, with some limitations, but even allow them to prosper and grow).

[16] *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 2 (1831) (wherein Justice Marshall coined the phrase "domestic dependent nation" in reference to Indian tribes). A "domestic dependent nation" is a government outside the constitutional structure that has retained elements of preexisting, aboriginal sovereignty. *Id.*

[17] *See, e.g., U.S. v. Lara*, 541 U.S. 193, 213 (2004)(J. Kennedy, concurring) (referring to Indian tribes as "extraconstitutional sovereign[s]").

[18] Like all governments, Indian nations owe duties to their polities. It is imperative that tribal governments take their dual responsibilities – to their tribal ways and to their people -- very seriously as they move into the 21st century. The question of the duties owed by tribal governments to their members is taken up fully in a future article.

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conceptions of their inherent, retained sovereignty dictate that the federal government ought to continue to respect tribal resolutions of purely intra-tribal disputes.[19] Additionally, as Congress recognized when it passed the Act in 1968, expansion of the ICRA would likely mean the end of core aspects of tribal differentness. As long as liberalism's basic protections of exit and dissent are present, tribes ought to be left to undertake the "indigenization of modernity"[20] on their own.

In the next Part, I provide a brief introduction to the definitions and discourse of illiberalism. I then set forth U.S. law governing illiberal groups within the United States, highlighting evidence of a trend towards greater federal encroachment into intra-tribal disputes. Part II discusses the illiberalism literature and demonstrates how these scholars often bundle Indian tribes with other illiberal actors without acknowledging those aspects of Indian sovereignty which differentiate tribes from other purportedly illiberal entities. Part III focuses, initially, on the legal and historical roots of tribal sovereignty. It then explores tribal sovereignty on the ground and at work within tribal communities. Finally, after demonstrating that the law supports tribal governmental freedom to govern independently and free from federal encroachment, Part IV highlights the costs of an expansion of the ICRA in Indian Country. If all ICRA claims arising from the tribal courts were subject to federal review, indigenous justice systems, traditional religions, and tribal membership decisions – to name but a few -- would be at the mercy of the novice federal courts. I conclude that the law does and ought to continue to support the perpetuation of Indians' autonomous existence. Internal tribal decisions regarding Indian culture and tradition ought to be left to Indian tribes, even when those decisions are inapposite to Western liberal ideals.

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[19] Although the ICRA provides for federal court review of habeas corpus claims arising from tribal courts, I do not advocate in this article for an amendment to the ICRA that would end federal court review of habeas corpus claims. As other scholars have pointed out, incarceration was seldom seen in traditional Indian societies, and, thus, review of habeas corpus claims does not threaten tribal culture in the same way as review of other provisions might.

[20] Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?,* 17 FLA. J. INT'L L. 115, 132-33 (2005) (citing Marshall Sahlins, *What is Anthropological Enlightenment? Some Lessons of the Twentieth Century*, 28 ANN. REV. ANTHROPOLOGY, at i (1999)) (describing the indigenization of modernity as the process through which indigenous peoples selectively utilize modern technologies and market mechanisms to revitalize tribal cultural identity in ways consistent with traditional life)). For more on the "indigenization of modernity" *see infra* PART IV.C.

I. ILLIBERALISM AND U.S. LAW

A. Illiberal Entities: The Landscape

Despite volumes of scholarship on the topic of illiberalism, there is a dearth of literature discussing or debating exactly what illiberalism *is*. Organizing cultures in the first place into the dichotomous structure of *liberal versus illiberal* can be problematic. As political theorist, Will Kymlicka, notes, "it is quite misleading to talk of 'liberal' and 'illiberal' cultures, as if the world was divided into completely liberal societies on the one hand, and completely illiberal ones on the other."[21] In fact, most societies are composed of both liberal and illiberal practices, and "the liberality of a culture is a matter of degree."[22]

Though definitional concerns persist, "illiberalism" has taken on a generally accepted meaning in the literature. Kymlicka defines such groups as those that "far from enabling autonomy, simply assign particular roles and duties to people, and prevent people from questioning or revising them."[23] In some societies, these labels may be assigned only to specific sub-groups, such as women, lower castes, or visible minorities.[24] This means that most illiberal groups are structured along patriarchal, theological, racist, classist or homophobic lines[25] where a members' status means they are treated as though they are

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[21] KYMLICKA, *supra* note 7, at 94. For the purposes of the arguments presented here, this article assumes that the United States is a "liberal" society. However, that designation may be contested, particularly considering that gay marriage bans, if deemed "illiberal," are, in fact, taken from the dominant society rather than departing from it. Additionally, the United States' continued use of the death penalty may call its status as a liberal state into question. *See, e.g.*, William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417, 422 (2004) (stating that "[a]bolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice, and repression"); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 39 (2003) (discussing the diverging histories of the death penalty in Europe and the U.S. and arguing that "with the United States as a spectacular exception, the contrast between abolitionist and executing nations is clear on questions of human rights, political freedom, and respect for democratic institutions.")

[22] KYMLICKA, *supra* note 7, at 94.

[23] *Id*. Kymlicka argues, further, that indigenous groups should enjoy rights of self-government, but only on the condition they exercise rights in accordance with liberal democratic conventions. WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 196-198 (1989). *See, also*, Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 181 (2003) (noting that "[o]ur autonomy is importantly constituted by our capacity to play different roles with craft and zeal in different contexts. It is this art of separation that defines what it means to live in a liberal society.")

[24] KYMLICKA, *supra* note 7, at 94.

[25] Rosen, *"Illiberal," supra* note 15, at 804.

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"members of more and less respect-worthy natural kinds."[26] To take one example, because of its continued decision to uphold the gender-based rule that women have no place in the priesthood, the traditional Roman Catholic Church constitutes an example of an illiberal organization operating within the private sphere of religion.[27]

The illiberalism literature reflects robust debates over the question of tolerance; that is, whether liberal societies can and should tolerate illiberal groups. Responses vary widely. Some scholars promote philosophies of "live and let live" – meaning that illiberal groups ought to be left alone to live as they like, so long as they receive no help from the state in continuing their illiberal practices.[28] Others contend that liberal society's tolerance of illiberalism only perpetuates the dominance of established regimes that serve to oppress individual autonomy. Therefore, the appropriate response is for liberal states to intervene.[29] And, of course, there are many authors writing between these extremes, basing their arguments on even finer distinctions between different types of illiberal groups.[30]

Even when a particular culture can be characterized as illiberal – remembering that all cultures contain both liberal and illiberal strains – many scholars argue that a central factor in determining whether liberal societies should tolerate such groups is based on whether members enjoy the freedom of exit (or opt-out rights) and dissent (or voice).[31] That is to say, liberal societies tolerate illiberal groups because they exist within the liberal state as voluntary associations where individuals can openly dissent from prevailing policies and freely enter and exit the group.[32] So long as these rights are available, sub-cultures are allowed wide latitude to maintain illiberal structures and beliefs.[33] This is because tolerance of

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[26] Doppelt, *supra* note 15, at 679.

[27] Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 718 (2003).

[28] Chandran Kukathas, *Cultural Rights Again: A Rejoinder to Kymlicka*, 20 POLITICAL THEORY 674-680 (1992).

[29] *See, e.g.,* Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1407 (2003) (arguing that "law should intervene [in illiberal cultures], even when deference is otherwise the rule, when grave injustice is at hand.") [hereinafter *Piercing the Veil*].

[30] *See, e.g.,* KYMLICKA, *supra* note 7, at 152 (drawing a distinction between groups that impose internal restrictions – those that restrict basic civil or political liberties of its own members – and those seeking external protections which are designed to protect the illiberal group from the dominant society); Rosen, *"Illiberal", supra* note 15, at 811 (drawing distinctions between "cultural illiberals" and "enforcement illiberals.")

[31] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

[32] Stolzenberg, *supra* note 15, at 897, 904.

[33] *See, e.g.*, HIRSCHMAN, *supra* note 31; Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 86 (2004) ("Exit is a bedrock liberal value."); JOHN RAWLS, JUSTICE AS FAIRNESS, A RESTATEMENT, 93-94 (Erin Kelly ed., 2001); Hills, *supra* note 23, at 161-

illiberal groups is thought to enhance the individual liberty of all people because it provides individuals "with a diversity of options among communities."[34] Simply put, if a member is displeased with the group, she is free to opt-out and join another that is more to her liking.[35]

Within this theoretical structure, groups that silence dissenting voices, for example, or that don't allow members freedom to opt-out, cannot be tolerated.[36] The Taliban, which has been called "the most extreme instance of the self-conscious, intentional repression of women's rights anywhere in the modern world,"[37] serves as one such example.[38] Such groups may be contrasted with other illiberal groups, which may have values at odds with liberal societies, but deny members freedom to choose other lifestyles, "not by force, but simply by virtue of their being a societal culture."[39] A voluntary organization like the Boy Scouts of America – which discriminates against homosexuals, but in which members may freely voice dissent and exit at will -- is one such example.[40]

Despite the views of classic liberalism, however, recent world events – such as a global rise in religious fundamentalism[41] and an increased focus on the plight of women living under oppressive, patriarchal regimes[42] – have fueled arguments against tolerance of illiberal groups,

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165 (arguing that, at least from the Rawlsian perspective, consent and exit "cure" the potential dangers posed by illiberal groups); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1126-27 (1998) (discussing opt-out rights within illiberal sub-sovereigns) [hereinafter *The Outer Limits*]; Stolzenberg, *supra* note 15, at 904 (discussing the liberal states' justification for accommodation of illiberal groups where exit rights are present); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 320 (1974).

[34] NOZICK, *supra* note 33, at 320.

[35] *Id*. at 323-324 ("If a person finds the character of a particular community uncongenial, he needn't choose to live in it.").

[36] Rosen, *"Illiberal," supra* note 15, at 811.

[37] Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 870 (2005).

[38] Rosen, *"Illiberal," supra* note 15, at 811.

[39] *Id*.

[40] William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 507 (2001).

[41] *See generally* KAREN ARMSTRONG, THE BATTLE FOR GOD xi (2001) ("One of the most startling developments of the late twentieth century has been the emergence within every major religious tradition of a militant piety popularly known as 'fundamentalism'."); GEORGE M. MARSDEN, FUNDAMENTALISM AND AMERICAN CULTURE (1980); ALISTER MCGRATH, THE TWILIGHT OF ATHEISM: THE RISE AND FALL OF DISBELIEF IN THE MODERN WORLD (2004); CHETAN BHATT, LIBERATION AND PURITY: RACE, RELIGIOUS MOVEMENTS AND THE ETHICS OF POSTMODERNITY (1997).

[42] Susan Moller Okin, *Is Multiculturalism Bad for Women? in* IS MULTICULTURALISM BAD FOR WOMEN? (Joshua Cohen et al. eds.,1999) (arguing that gendered socialization within the family, which may impose on women a sense of inferiority to men or deprive women educational opportunities or means of independence, often means that women have no meaningful exit options,

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even those that freely allow members to exit at will.[43] Fearing that cultural tolerance may be becoming "a cloak for oppression and injustice,"[44] some theorists are becoming ever more critical of illiberalism. They advocate, in some instances, for a breakdown of the public/private distinction that, at least in American law, has shielded some private association from Constitutional scrutiny.[45] And cases like *The Boy Scouts of America v. Dale*[46] have only incited these critics to question the dichotomy of the public and private spheres more than ever before.[47] Taken together with claims regarding the inadequacy of exit

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even if such results are not legally mandated). *See, e.g.,* Declan Walsh, *In Pakistan, 'Rescues' from Marriages; Unwilling Brides Aided by British Diplomats,* BOSTON GLOBE, Dec. 31, 2005, at A1 (British diplomats aid women lured to Pakistan for forced marriages); Larry Derfner, *Family Honor Killing*, THE JERUSALEM POST, Dec. 16, 2005, at 12 (father and two uncles charged with murder of woman in Israel; annually, hundreds of Israeli Arab women said to be at risk of being killed to restore "family honor"); Christine Spolar, *For Family Honor, She Had to Die; European Police Weren't Looking for This Kind of Violence Steeped in Tradition. They Are Now*, CHICAGO TRIBUNE, Nov. 17, 2005, at 1 (reviewing "honor killing" of women in Europe and overall); *Pakistani Rape Victim Becomes Beacon for Women's Rights*, ABC NEWS PERSON OF THE WEEK, Oct. 21, 2005, *available at* http://abcnews.go.com/WNT/PersonOfWeek/story?id=1237950&page=1 (Pakistani high court ultimately convicts men of rape after woman who was gang-raped as punishment for her brother's transgression pressed charges); Sharon LaFraniere, *Women's Rights Laws and African Custom Clash*, N.Y. TIMES, Dec. 30, 2005, at A1 (on how slowly, if at all, change is affecting women's lives in Africa). *See also* Shannon A. Middleton, *Women's Rights Unveiled: Taliban's Treatment of Women in Afghanistan*, 11 IND. INT'L & COMP. L. REV. 421 (2001) (examining the Taliban's oppressive treatment of women in the context of Afghani history and Islamic principles); Benazeer Roshan, *The More Things Change, the More They Stay the Same: The Plight of Afghan Women Two Years After the Overthrow of the Taliban*, 19 BERKELEY WOMEN'S L.J. 270 (2004) (two years after the ouster of the Taliban, conditions for women in Afghanistan remain much the same as before).

[43] *See* Rosen, *"Illiberal," supra* note 15, at 805-06 (discussing the work of Gerald Doppelt and Will Kymlicka, concluding that "[v]irtually all who have addressed this question [of liberal cultures tolerating illiberal ones] conclude that liberalism should provide little if any quarter for such groups.") *Cf.* Abner S. Green, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996) (arguing that a majority liberal entity should grant public power to a minority illiberal one when the latter seeks to exit only partially and not completely, and as long as Constitutional norms are not otherwise violated).

[44] Chandran Kukathas, *Cultural Toleration*, NOMOS 39: ETHNICITY AND GROUP RIGHTS 69 (eds. Shapiro & Kymlicka 1997) (citations omitted) (citing Sebastian Poulter, *Ethnic Minority Customs, English Law and Human Rights*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 36 (1987) at 593. *See generally* OKIN, *supra* note 42.

[45] *See* Erwin Chemerinsky & Catherine Fisk, *Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale: The Expressive Interests of Associations*, 9 WM. & MARY BILL OF RTS. J. 595, 596 (2001) (noting that a core tenet of group rights is the freedom to determine "who is in and who is out").

[46] 530 U.S. 640 (2000). *See* Chemerinsky & Fisk, *supra* note 45, at 597 ("Someday, *Boy Scouts of America v. Dale* will be repudiated by the Court like other rulings that denied equality to victims of discrimination.").

[47] *See, e.g.*, Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 467 (2004) ("the exemption from equality norms in the context of both religious and nonreligious associations should be strictly restricted to situations of intimate association"); Martha C. Nussbaum, *In Defense of Universal Values,* 36 IDAHO L. REV. 379 (2000) (arguing that a set of "universal norms of human capability"

rights -- that, even where not legally proscribed, the cost of exit to the individual may be prohibitively high,[48] or the right of opt-out may be altogether illusory[49] -- has led to increasing demands for intervention by liberal governments into the affairs of illiberal groups.

Not all illiberal groups within the United States are treated similarly under federal law. Section B of this Part provides a brief overview of U.S. law on this topic as it relates to the (American) Constitutional governments. Then, Section C explains in greater detail federal laws applicable to the inner workings of the Indian nations.

B. An Overview of U.S. Law Regarding Illiberalism

The protections in the Bill of Rights apply directly only against the national government. Most of these protections apply indirectly to the states through the Due Process Clause of the Fourteenth Amendment by the process of selective incorporation.[50] Thus, the federal, state and local governments are all Constitutionally bound not to act illiberally.[51]

Accordingly, most examples of illiberal practices within the United States – such as the Boy Scout's decision to disallow gays – occur in the private sector where the absence of "state action" offers organizations the freedom to act in ways that might offend Constitutional notions of equality. This is because the freedom of (illiberal) association is Constitutionally protected under the First Amendment as the right of

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which cross public-private, political, cultural, international and religious boundaries can be determined and should be adopted in all national constitutions); Tracy E. Higgins, *Why Feminists Can't (Or Shouldn't Be) Liberals*, 72 FORDHAM L. REV. 1629, 1629 (2004) ("I would argue that certain core characteristics of liberalism--the centrality of the public/private divide and an overriding emphasis on pluralism within the private sphere--taken together, limit the usefulness of liberalism to a feminist agenda . . .").

[48] *See, e.g.*, Sunder, *Piercing the Veil*, *supra* note 29, at 1409 (2003) (arguing that "traditional liberalism takes too lightly the ease of exit from one's community and the desirability of culture."); Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661, 672 (1998) (contending that the safety valve of "exit" is not adequate because it is available too late, after harm to a woman's prospects has already occurred, or is precluded by the fact that a woman in a restrictive culture may not see its availability).

[49] OKIN, *supra* note 42, at _ (arguing that gendered socialization within the family, which may impose on women a sense of inferiority to men or deprive women educational opportunities or means of independence, often means that women have no meaningful exit options, even if such results are not legally mandated.)

[50] Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1513 (2005).

[51] *See id*. at 1515-1516 (explaining that the federal, state, and local governments are bound by the Bill of Rights and the U.S. Constitution). *Cf.* discussion of gay marriage in the dominant society, *infra* PART III.

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association.[52] Although the right of association does not appear in the text of the Constitution – and was only officially recognized by the Supreme Court in the late 1950's,[53] -- it is now heralded as "a fundamental right."[54] The freedom of association is used as a conduit for the protection of other Constitutionally protected liberties, such as speech, assembly, petition for the redress of grievances, and the exercise of religion.[55] In this regard, the right to associate with others is considered in light of one's pursuit of various political, economic, and religious goals.[56]

In regard to illiberalism within the private sphere, the Supreme Court has delineated a "gradient of protectable expression with two diametrically opposed poles represented by political or intimate associations on the one hand (high levels of protection) and economic associations on the other (little or no protection)."[57] Organizations that are between these poles – such as the Jaycees, which is a private social club with a quasi-commercial purpose[58] -- receive some selective and intermediate measure of protection.[59]

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[52] *See* Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN. L. REV. 129, 139 (2002) (noting that rights to intimate association are one branch of the right to privacy under the Constitution, with its "doctrinal home" in substantive due process); Chemerinsky & Fisk, *supra* note 45, at 597-598 (noting that, though unenumerated, association is a "fundamental right" that is "integral" to all other First Amendment rights). *See generally* Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 (1995).

[53] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (in which the Supreme Court articulated a constitutional right of association, as opposed to assembly).

[54] Chemerinsky & Fisk, *supra* note 45, at 597 (2001).

[55] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-618 (1984) ("In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.").

[56] Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1240 (2003).

[57] John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery,* 90 CAL. L. REV. 485, 530 (2002).

[58] *Jaycees*, 468 U.S. at 638-640 (O'Connor, J., concurring in part and concurring in the judgment) (noting with approval that the lower courts unanimously determined the Jaycees was "first and foremost, an organization that . . . promotes and practices the art of solicitation and management", that "[r]ecruitment and selling are commercial activities, even when conducted for training rather than for profit," and that the Court's traditional expressive-commercial dichotomy analysis was appropriately applied).

[59] McGinnis, *supra* note 57, at 530-31.

Indian tribes are anomalous within this system. Unlike states, they are not encompassed within, and, therefore not bound by the U.S. Constitution. But, at the same time, they possess rights and functions unique to their sovereign status, which means they also cannot be directly analogized to private clubs. As discussed fully in Part III, their relationship with the United States government is one of nation-to-nation.[60] This relationship has been developed over hundreds of years, and is captured in treaties, the Constitution, and a vast body of Supreme Court jurisprudence.[61] Thus, while it is often assumed that the Constitution – including the Bill of Rights -- binds governmental action at every level, the reality is that tribal governments have always been and remain today outside of the scope of the United States Constitution.[62] In short, they are "extraconstitutional."[63]

Because the Bill of Rights neither applies to nor limits the sovereignty of domestic tribal nations,[64] tribal sovereignty means that tribes cannot be encompassed in the "usual constitutional dialogue" of individual rights.[65] Tribal sovereignty necessarily situates Indian tribes beyond the federal-state paradigm that dominates individual civil liberties discourse within the United States. In fact, it was Congress' recognition of tribes' unique status – and their corresponding freedom to act beyond the scope of the Constitution in regards to individual tribal members -- that prompted the passage of the Indian Civil Rights Act.

C. Indian Tribes and the Law of Illiberalism

1. The Indian Civil Rights Act

[60] *See, e.g.,* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations,* 89 IOWA L. REV. 1595, 1601 (2004). Treaty making as a means of governing relations between Indian nations and the subsequently formed United States continued for over one hundred years before it ended. *See* 25 U.S.C. § 71 (2000) (originally enacted as Act of March 3, 1871, Ch. 120, §1, Stat. 544, 566). ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation... with whom the United States may contract by treaty.").

[61] *See infra* PART III.

[62] *Talton v. Mayes*, 163 U.S. 376 (1896).

[63] *See, e.g., U.S. v. Lara*, 541 U.S. 193, 213 (2004) (J. Kennedy, concurring) (referring to Indian tribes as "extraconstitutional sovereign[s]"). *See also* Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 336 (2004) [hereinafter *Racial Equality*]. *But see* Carol Tebben, *An American Trifederalism Based on the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 324 (2003) (arguing that tribes are pre-constitutional in the sense that they existed as sovereigns before the creation of the United States Constitution, and they have reserved extra-constitutional sovereign authority that has not been delegated to the national government, but tribes do have constitutional status).

[64] *See generally* Tebben, *supra* note 63.

[65] Valencia-Weber, *Racial Equality*, *supra* note 63, at 373.

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When the protection of individual civil liberties gained momentum in American politics in the 1960's,[66] Congress sought to apply some constitutional norms to tribal governments in the form of restrictions similar to those contained in the Bill of Rights.[67] This effort was undertaken to ensure that tribal governments offered similar protections to individual Indians as those enjoyed by citizens living subject to the control of state and local governments.[68] The Senator who introduced the Indian Bill of Rights was Sam Ervin of North Carolina.[69] Ervin was inspired, in part, to introduce the bill because a Lumbee Indian had worked for Ervin as his aide on the Subcommittee on Constitutional Rights.[70] Ervin admired the acculturation of the non-reservation Lumbees and saw them as models for other Indians.[71] Thus, extending the same constitutional protections to individual Indians as those afforded to other citizens seemed a logical step. When Ervin learned that the Bill of Rights did not apply to Indians living under the control of tribal governments, Ervin commented that such a notion was "alien to popular concepts of American jurisprudence."[72]

Much debate surrounded the initial bills. One critical issue was whether Congress would extend to Indian tribes the First Amendment's prohibition on the Establishment of Religion.[73] The question was raised,

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[66] *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 922 (1989) ("Kennedy's murder marked the arrival of the freedom surge…"); Julian Bond, *Introduction* to JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965, at xi, xv (1988) ("The social movements of the sixties – the antiwar movement, the women's movement, and others – all followed in the wake of the [1954-1965] civil rights movement.").

[67] Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 556, 557 (1972).

[68] S. Rep. No. 90-841, at 5-6 (1967) (noting that a central purpose of the ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments."); 113 Cong. Rec. 13,473 (1967) (statement of Sen. Ervin) (noting that the Subcommittee concluded that denials of Indian civil liberties did not occur from malice or ill will, or from a desire to do injustice, but due to an under-funded legal system where tribal judges were placed into the position of acting like American jurists but had been given no training in the traditions and forms of the American legal system.).

[69] John R. Wunder, *The Indian Bill of Rights, in* THE INDIAN BILL OF RIGHTS 1, 4 (Wunder ed. 1996).

[70] *Id.*

[71] *Id.*

[72] *Id.* Ervin, of course, failed to realize that Indians did not necessarily want to be like other citizens. They were different, and they wanted the freedom to stay that way. *Id.*

[73] Everett Saucedo, *Curse of the New Buffalo: A Critique of Tribal Sovereignty in the Post-IGRA World*, 3 SCHOLAR 71, 98 ("Paragraph 1 of Title II [of ICRA] is essentially a carbon copy of the first amendment; however, it excludes the prohibition against the establishment of a religion. This exclusion is an acknowledgement of the fact that many Indian tribes are theocratic in nature."

in part, due to testimony from tribal elders from the New Mexico Pueblos, who informed Congress that their theocratic form of government would be destroyed by such a rule.[74] For tribes who maintain a theocratic governance system, the eradication of the theocracy means the end of tribal governance and, with it, tribal sovereignty.[75] The elders' testimony emphasized that extending the Establishment Clause to Indian tribes would likely mean the destruction of tribal theocracies far older than the Constitution itself.[76] Thus, Congress revised the ICRA, removing restrictions on tribal establishment of religion, while protecting the free exercise of religion by individual tribal members.[77]

The Indian Civil Rights Act was enacted as a rider to the Civil Rights Act of 1964.[78] When passing the ICRA into law, Congress declined to apply the full complement of Constitutional restraints to Indian tribes to further its two "distinct and competing purposes" in enacting the ICRA: strengthening the position of individual tribal members vis-a-vis tribes, and promoting the well-established federal policy of furthering Indian self-government.[79] Thus, as stated, the ICRA did not contain an Establishment Clause, which means that Indian tribes are the only constitutionally permitted theocracies within the United States.[80] Congress also declined to extend to Indian tribes the requirement of grand jury indictment, jury trials in civil cases, and the right to counsel by indigent defendants.[81]

Critical to passage of the Act was Congress' express determination that federal courts ought not have judicial review over all tribal court decisions arising from the Act. As was borne out in the pivotal case of *Santa Clara Pueblo v. Martinez*, discussed below, Congress limited federal court review of claims arising under the ICRA to its habeas corpus provision.[82]

(citing Hearings on S. 961-68 and J.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 9, at 623 (1966))).

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[75] Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1380 N. 82 (2002).

[76] Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act,* 68 N.D. L. REV. 657, 664-65 (1992).

[77] *Id*. at 664-65.

[78] Burnett, Jr., *supra* note **Error! Bookmark not defined.**, at 556.

[79] *Santa Clara Pueblo*, 436 U.S. at 62.

[80] Gloria Valencia-Weber, *Santa Clara Pueblo v. Martinez: Twenty-Five years of Disparate Cultural Visions*, 14-FALL KAN. J.L. & PUB. POL'Y 49, 52 (2004). *See*, Torres, *supra* note 75, at 1380 n. 82 (noting that, in structuring ICRA as it did, "Congress explicitly recognized as legitimate a form of government that the Constitution expressly prohibits.").

[81] 25 U.S.C. § 1302 (1968). Nor were these features incorporated via the Fourteenth Amendment.

[82] 113 Cong. Rec. 13,471 (1967).

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2. *Santa Clara Pueblo v. Martinez*

Though Indian tribes have long been culturally distinct from mainstream Americans,[83] their status as (potentially) illiberal groups was popularized twenty-seven years ago when the U.S. Supreme Court decided the now infamous case of *Santa Clara Pueblo v. Martinez*.[84] *Santa Clara Pueblo* involved the membership status of the children of Julia Martinez, a member of the Pueblo, and her husband, Myles Martinez, a Navajo.[85] The Santa Clara Pueblo passed a membership ordinance in 1939 which stated that children of females who married outside the Pueblo were not members, while the children of men who married outside the Pueblo could be members.[86] Unable to persuade the Pueblo to change its membership rules, Julia Martinez and her daughter filed a lawsuit against the tribe and its Governor under the ICRA in federal court. Martinez sought to invalidate the ordinance and to require the Pueblo to include her children as members.[87]

Justice Thurgood Marshall wrote for the majority, focusing, in particular, on the purposes behind the ICRA and the Pueblo's right to self-determination and continued existence.[88] First, the Court noted that Title I of the ICRA imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."[89] The Court expressly held that tribal courts could give affect to norms imposed by the ICRA in ways that are in keeping with traditional tribal structures.[90] The Court recognized that membership decisions are at the core of tribal self-government and that the Pueblo are in the best position to determine what it means to be Santa Claran.[91]

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[83] *See, e.g., Ex parte Crow Dog* (wherein Crow Dog murdered another Indian on the Brule Sioux reservation and paid the tribal penalty of restitution to the victim's family: cash, horses and blankets. The tribe's adherence to restitution rather than retribution – and, specifically, its decision not to sentence Crow Dog to death -- led to the passage of the Major Crimes Act and federal authority over certain enumerated crimes, including murder).
[84] 436 U.S. 49 (1978).
[85] *Id*. at 52 (1978). *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 672 (1989) [hereinafter *Dependent Sovereigns*].
[86] *Santa Clara Pueblo*, 436 U.S. at 52 n.2. *See* Resnik, *Dependent Sovereigns*, *supra* note 85, at 672.
[87] *Id*. at 53. *See* Resnik, *Dependent Sovereigns*, *supra* note 85, at 672.
[88] *Id*. at 62. *See also* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 445-446 (2005).
[89] *Id*. at 57.
[90] *Id*. at 72.
[91] *Id*. at 72 n.32. *See also* Frickey, *supra* note 88, at 445-446.

Marshall also took up the question of sovereign immunity—that is, whether a tribal nation, as a separate sovereign from the United States, could ever be sued in federal court absent a clear waiver of immunity by the tribe or by Congress. Finding no such waiver within the statute, the Court concluded that the tribe could not be sued under the ICRA in federal court.[92] Marshall went on to point out that "[t]ribal forums are available to vindicate rights created by the ICRA."[93] He emphasized: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[94] The Court made no exception for tribes in which judicial authority is vested in a nonjudicial entity, such as (in the case of the Santa Clara Pueblo) a tribal council, calling such fora "competent law-applying bodies."[95]

Much of the Court's rationale rested on its simultaneous faith in tribal dispute forums and its concern over the competency of the federal courts to decide issues critical to tribal governance. Marshall revealed great

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[92] The Court pointed out that, when a petitioner brings a habeas corpus action in federal court, the respondent in the action is the individual custodian of the prisoner, not the tribe. Therefore, the ICRA's habeas provision, Section 1303, cannot be read as a general waiver of the tribe's sovereign immunity. *Id*. at 58-9.

[93] *Id*. at 65.

[94] *Id*.

[95] *Id*. at 66. Many tribal courts have interpreted the ICRA – as illuminated by *Santa Clara Pueblo* -- as creating an implied waiver of tribal sovereign immunity in tribal courts for purposes of ICRA claims. *See* Alexander Tallchief Skibine, *Julia Martinez, Petitioner v. Santa Clara Pueblo, Respondents*, 14-FALL KAN. J. L. & PUB. POL'Y 79 (2004) (stating that "most tribal courts interpret the ICRA as an implied waiver of the tribes' sovereign immunity in their own tribal courts and have taken seriously their role in implementing the Act's protections.") (Citations omitted); Others expressly waive their immunity for civil rights suits in tribal courts through their tribal constitutions. *See, e.g.*, CONST. AND BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WIS. Art. XVIII, Sections 1-2 (1977) (waiving tribal immunity in tribal court for Indian Civil Rights Act cases). *See also*, Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. L. REV. 889, 900 (2003)("Most tribal courts or councils waive sovereign immunity so as to enable litigants to challenge actions of tribal officers for violating the Act."); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 480-83 (1998) (discussing those tribal courts that have found tribal sovereign immunity to be waived for purposes of ICRA claims). *Cf.* Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 959 (2002) ("A number of tribal courts have held that ICRA does not abrogate a tribe's sovereign immunity in tribal court and have declined to entertain suits brought against tribes under ICRA. Accordingly, even for violations of ICRA, injured parties find themselves without a forum in which to adjudicate their claims against these tribes."); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 509 (2000) ("The doctrine of tribal sovereign immunity, however, is a potential doctrinal obstacle to the tribal courts' functioning as fora to vindicate ICRA rights."). Despite its controversial nature, tribal sovereign immunity is essential to tribal self-government. *See generally*, Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 708 (2004) (discussing the importance to self-governance of tribal sovereign immunity for tribal governments in federal courts).

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unease at the prospect of authorizing the federal courts to adjudicate disputes within Indian tribes, maintaining that to do so would threaten the survival of the community as a distinct group.[96] The Court stated: "Resolution of statutory issues under [the ICRA] . . . will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." Also, "efforts by the federal judiciary to apply [the ICRA] . . . may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."[97] Accordingly, the Court construed the ICRA narrowly and held that the only remedy in federal court was for habeas corpus violations as expressly provided for in the statute. The Court declined to imply a right of action, holding that to do so would undermine Congress' purpose in protecting tribal sovereignty and the Pueblo's right of self government.[98]

Santa Clara Pueblo caused a furor. By declining to intervene in the case to protect tribal sovereignty, the Court allowed the Santa Clara Pueblo to continue to determine its membership pursuant to sexually discriminatory membership rules. Mainstream feminists responded swiftly and harshly.[99] Indian scholars retorted with passionate pro-sovereignty arguments of their own.[100] With few compromise positions

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[96] *Id*. at 71.
[97] *Id*. at 72.
[98] *Id*. at 71-72.
[99] *See, e.g.*, CATHERINE MACKINNON, *Whose Culture? A Case Note on* Martinez v. Santa Clara Pueblo, in FEMINISM UNMODIFIED 63 (1987) (arguing that Pueblo tribal governance is rooted in male supremacy); Resnik, *Dependent Sovereigns*, *supra* note 85, at 702 (finding that the Santa Clara Pueblo Court prioritized sovereignty interests over the challenging of rules that "subordinate women"); Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L. J. 169, 177-78, 185 (1991) (finding that the result of the Court's "great respect" for tribal sovereignty was a second victimization of Native American Indian women, who suffer discrimination both within and without the tribe). *See also* AMY GUTMANN, IDENTITY IN DEMOCRACY (2003); Marie Anna Jamie Guerrero, *Civil Rights Versus Sovereignty: Native American Women in Life and Land Struggles*, in FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES 101-02, 107 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).
[100] *See, e.g.*, Gloria Valencia-Weber & Christine Zuni Cruz, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 88-93 (1995) ("Indian feminists have rejected the Western feminist approach to gender equality by retaining the cultural framework and a commitment to the tribal nations' autonomy"); Valencia-Weber, *Racial Equality*, *supra* note 63, at 365-75 (arguing that the conflict between native and constitutional visions of the relationship between individual and group rights is exacerbated by non-tribal outsiders' lack of knowledge); Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347, 367-70 (2002) (arguing that "cultural sovereignty" is the foundation on which both autonomy and internally-directed changes to tribal structure and culture rest); Rayna Green, *Native American Women*, 6 SIGNS 248, 264 (1988) ("For Indian feminists, every women's issue is framed in the larger context of Native American people"). *See also* KATE SHANLEY, *Thoughts on Indian Feminism*, *in* A GATHERING OF

put forth,[101] reconciliation between the camps was never fully realized. *Santa Clara Pueblo* was certainly not the beginning of the schism between liberal theorists who advocate for the primacy of individual rights and Indian scholars who argue that the "measured separatism"[102] guaranteed to Indian tribes throughout history must be respected. But, in many instances, *Santa Clara Pueblo* was the first time liberal theorists had really paid attention to Indian Country. And, like the "surfeit of patrons"[103] before them, they became dedicated to changing Indian tribes, once again, for the better.

3. Hints of Dissatisfaction with the ICRA and *Santa Clara Pueblo*

In 1996, the Second Circuit Court of Appeals wedged open the crack in the door to federal court review of ICRA claims in the landmark case of *Poodry v. Tonawanda Band of Seneca Indians*.[104] *Poodry* was brought by several members of the Tonawanda Band of Seneca Indians who were also members of the Council of Chiefs (the "Council"), a governing body responsible for carrying out the views of the tribe on internal tribal matters.[105] Plaintiffs accused other members of the Council of certain violations, including the misuse of tribal funds, suspending tribal elections, excluding members of the Council from

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SPIRIT: A COLLECTION BY NORTH AMERICAN INDIAN WOMEN 213, 215 (Beth Brant ed., 1988); C.L. Stetson, *Tribal Sovereignty: Santa Clara Pueblo v. Martinez: Tribal Sovereignty 146 Years Later*, 8 AM. IND. L. REV. 139, 152 (1980) (arguing that "Anglo-American reluctance" to accept the Santa Clara Pueblo ordinance regarding the children of women who married outsiders arises from "a distrust of alien norms and from a belief that United States law is the only applicable law.").

[101] *Cf.*, Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 50 (2005) (arguing that her own solution would have been to require the provision of many federal benefits to Ms. Martinez's children while remitting the question of tribal recognition to the Pueblo, but also recognizing that this proposal "would have been understood by the Court as a serious counterweight to tribal governance.") [hereinafter *Paideic Communities*]; Laurence, *supra* note 76, at 657 (1992) (positing that the ICRA ought to be expanded to allow federal court review, but this action must be accompanied by a reversal of cases that deny Indian tribes jurisdiction over non-Indians).

[102] WILKINSON, *supra* note 6, at 14, 16 (asserting that the central thrust of federal Indian law has always been to create a "measured separatism.").

[103] Burnett, *supra* note **Error! Bookmark not defined.**, at 622 ("The [federal] judge may believe that he perceives what is best for the tribes within the court's jurisdiction; but the Indians have suffered from a surfeit of patrons in all branches of governments. Given adequate resources, the tribes may best adjust to the new legislation in a judicial milieu of sensitive, restrained construction. In this difficult period of transition, the judge who seizes opportunities to demand more of the tribes than required by the letter and history of the Act might become a contemporary analogue to the BIA agent of an earlier period, who imposes tenets of personal conviction through the power of the white conqueror.").

[104] 85 F.3d 874 (2nd Cir. 1996).

[105] *Id*. at 877.

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making decisions regarding the tribe's business affairs, and even burning tribal records. The Plaintiffs then formed a competing government, the Interim General Council of the Tonawanda Band. Subsequent to the formation of the competing government, Plaintiffs were informed by letter that the Tonawanda Council of Chiefs had stripped them of their tribal citizenship and banished them from the tribe's territory.[106]

Plaintiffs sued in federal district court, alleging that the tribal council's actions constituted violations of their rights under the Indian Civil Rights Act.[107] The district court dismissed the case for lack of subject matter jurisdiction, holding that banishment could not trigger application of the ICRA's habeas corpus provision.[108]

Plaintiffs appealed. The Second Circuit identified the issue on appeal as "whether an Indian stripped of tribal membership and 'banished' from a reservation has recourse in a federal forum to test the legality of the tribe's actions."[109] Specifically, the court asked whether the habeas corpus provision of the Indian Civil Rights Act allows a federal court to review punitive measures imposed by a tribe upon its members, "when those measures involve 'banishment' rather than imprisonment."[110] The court noted that Section 1303, ICRA's habeas corpus provision, provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[111] Thus, the court concluded, it could only find federal court jurisdiction over the claim if the tribe's banishment order constituted a "detention by order of an Indian tribe."[112]

The court first cited to *Santa Clara Pueblo* as controlling precedent. Due to *Santa Clara Pueblo's* limitation on federal court review, the court opined, federal application of the substantive provisions of the ICRA would be precluded, except where the relief sought could properly be cast as a writ of habeas corpus.[113] The court emphasized the importance of the question, as the *Poodry* plaintiffs had no access to review within the tribal community.[114] Thus, "[i]f the reasoning of

[106] *Id*. at 878.
[107] *Id*. at 879.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] 25 U.S.C. §1303; *Poodry*, 85 F.3d. at 889.
[112] *Id*. at 890-891.
[113] *Id*. at 885.
[114] *Id*.

Santa Clara Pueblo forecloses federal habeas jurisdiction, the petitioners have no remedy whatsoever."[115]

In analyzing the case, the court first made the threshold determination that the sanctions against petitioners were criminal rather than civil, which was a necessary initial hurdle for Plaintiffs seeking habeas review.[116] Then the court turned to the issue of whether the Plaintiffs were being "detained" within the meaning of Section 1303. In construing the term "detention," the court concluded that it must conduct the same inquiry under section 1303 as required by other habeas statutes, even though the ICRA's habeas provision is unique and utilizes language distinct from that of other habeas statutes.[117] That is, the ICRA employs "detention," whereas other statutes use the term "custody."[118] Interpreting case law regarding the meaning of "custody," the court determined that "detention" for purposes of the ICRA could be met by either physical imprisonment or "sever[e] . . . actual or potential 'restraint[s] on liberty.'"[119] Accordingly, the Second Circuit held that the banishment orders did constitute severe restraints on liberty. Therefore, federal court jurisdiction of Plaintiffs' ICRA claims was proper.[120]

Poodry was monumental.[121] It marked a change in the landscape of external review over intra-tribal matters, and its affects were felt all across Indian Country.[122] In the 2004 case of *Quair v. Sisco*,[123] a federal

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[115] *Id*.
[116] *Id*. at 889.
[117] *Id*.
[118] *Id*. at 890.
[119] *Id*. at 894.
[120] *Id*. at 895.
[121] I believe it was improper for the *Poodry* court to circumvent *Santa Clara Pueblo's* limitation on federal court review of tribal court decisions through its crafty analysis of "detention." Whether federal court review ought to ever be allowed in cases like *Poodry* turns, in my view, on the existence of adequate protections for exit and dissent within the particular Indian tribe. *See supra* note 18.

For the argument that *Poodry* was decided correctly, but for the wrong reasons, *see* Rosen, *The Outer Limits*, *supra* note 33, at 1136-1140 (arguing that the federal court properly exercised jurisdiction, but it ought to have only been concerned "whether the tribal council had faithfully followed its own customary banishment procedures, as the tribal council in fact had claimed in their banishment letters.")

[122] *See, e.g., Shenandoah v. U.S. Dept. of Interior*, 159 F. 3d 708 (2nd Cir. 1998) (holding that members of the Oneida Indian Nation did not suffer severe restraint on their liberty, nor did they exhaust administrative remedies, as required for habeas corpus relief under ICRA); *Alire v. Jackson*, 65 F. Supp. 2d 1124 (D.Or. 1999) (granting defendant's motion for summary judgment on the grounds that exclusion of nonresident nonmember was civil proceeding, for which habeas corpus relief was not available); *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279 (N.D.N.Y. 2003) (holding that the court lacked subject matter jurisdiction to hear habeas corpus claim under ICRA).
[123] 359 F. Supp. 2d 948 (E.D. Cal. 2004).

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district court in California grappled with an issue almost identical to that addressed in *Poodry*: whether a tribal government's disenrollment and banishment of tribal members constituted a "detention" within the meaning of the ICRA, thus satisfying the elements for a writ of habeas corpus claim and triggering federal court review.[124] Calling *Poodry* "authoritative" on the issue,[125] the court held that disenrollment of tribal members and their subsequent banishment from the reservation did constitute "detention" as required for habeas review under the ICRA.[126] Then, having ruled that federal court review was appropriate, the court addressed the merits of the case, ruling on the parties' cross motions for summary judgment.[127]

Other detention-based ICRA claims – failing to rise to the level of restraint necessary to invoke federal habeas jurisdiction – have since failed, even under *Poodry*.[128] But another class of ICRA cases has arisen since *Poodry*. These courts have dismissed ICRA claims pursuant to *Santa Clara Pueblo*, but, in doing so, reveal serious concern over the lack of federal court review of claims arising under the ICRA.[129] In

[124] *Id.* at 963.
[125] *Id*. at 964.
[126] *Id*.
[127] *Id*. at 981. (The court ruled that as to the issues of denial of due process and denial of a fair trial, both Respondents and Petitioners motions for summary judgment were denied; on issues of exceeding jurisdiction in imposing banishment and loss of benefits in violation of § 1302(7), exceeding jurisdiction at March 31, 2000 General Council Meeting, double jeopardy and excess of jurisdiction Petitioners' motion for summary judgment was denied and Respondents' motion for summary judgment was granted; on issue of excess of jurisdiction (failure to obtain BIA approval), Petitioners' motion for summary judgment was granted; on issue of assets held in trust cannot be abrogated by General Council, Petitioners' motion for summary judgment was denied).
[128] *See*, *e.g.*, *Shenandoah v. Halbritter*, 366 F.3d 89 (2nd Cir. 2004) (holding that petitioners' claims did not amount to a sufficiently "severe restraint on liberty" under *Poodry* to invoke federal court habeas review); *Shenandoah v. U.S. Dept. of the Interior*, N. 96-CV-258 (RSP/GJD), 1997 WL 214947 (N.D. N.Y. April 14, 1997) (holding that petitioners' claims did not amount to a sufficiently severe restraint on liberty under Poodry to invoke federal court habeas review).
[129] *See, e.g., LaMere v. Superior Court of the County of Riverside*, 131 Cal. App.4th 1059, 1063 note 2 (in which the court held that the state court did not have jurisdiction under Public Law 280 to intervene in case brought under the Indian Civil Rights Act. But, in a footnote, the court expounded on its opinion, stating that "our ruling means that plaintiffs have no formal judicial remedy for the alleged injustice . . . [T]ribes have been given broad power to order their own affairs without regard for Eurocentric mores. To the extent that Congress has not chosen to provide an effective external means of enforcement for the rights of tribal members, the omission is for Congress to reconsider if and when it chooses."); *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) (holding that the court did not have jurisdiction to intervene in intratribal membership dispute which raised ICRA claims. In so holding, the court opined: "We agree with the district court's conclusion that this case is deeply troubling on the level of fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of tribal sovereign immunity. This is a matter in the hands of a higher authority than our court."); and *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2nd Cir. 2004) (holding that federal court did not have jurisdiction to hear Indian Civil Rights Act claim, but noted that "[e]ven though the actions of the ruling members of the Nation may be partly inexcusable herein, we can only remedy those wrongs which invoke the jurisdiction of this Court. Unfortunately

some instances, these opinions express angst over evidence of potential abuses by tribal governments and urge either Congress or the Supreme Court to intervene.[130]

The *Poodry* and *Quair* courts reacted to the concern raised by the Supreme Court's decision in *Santa Clara Pueblo;* that is, that rogue tribal governments are engaging in rampant violations of individual civil liberties. These decisions are the concrete manifestation of fears that have been brewing since first contact between Europeans and Natives; namely, that Indian tribal justice is simply too far afield from Western liberalism to be tolerated. *Poodry* and *Quair* may represent the real-world consequences of that belief; the illiberalism literature, discussed in the following Section II, embodies its theoretical component.

II. ILLIBERALISM'S DISCONTENTS

A. The Illiberalism Literature

Many scholars who have contributed to the growing body of illiberalism literature rely on specific examples of illiberal entities to bolster their respective claims. Within this critique, Indian tribal governments are often included as examples of illiberal actors. While a few scholars draw on relatively obscure tribal laws or practices,[131] the vast majority label Indian tribes as illiberal due, primarily, to *Santa Clara Pueblo v. Martinez.*[132] Oftentimes, the case is offered as evidence that Indian tribes operate inconsistently with Western liberal ideals and largely without oversight by the dominant society.[133] But few scholars

for Petitioners, Constitutional provisions limiting federal or state authority do not, per se, control the actions of the tribal governments complained of herein.).

[130] *Id*.

[131] *See, e.g.*, KYMLICKA, *supra* note 7, at 164-65 (referencing a case where the Pueblo enforced theocratic government and did not respect the religious liberty of tribal members who had converted to Protestantism); Rosen, *"Illiberal," supra* note 15, at 829 (noting a Winnebago gender-specific tribal law and custom); Rosen, *The Outer Limits*, *supra* note 33, at 1078 n. 102 (1998) (noting the congruence of political, religious and personal identity among the Hopi).

[132] *See, e.g.*, KYMLICKA, *supra* note 7, at 165 (classifying the Santa Clara Pueblo as illiberal because they use "sexually discriminatory membership rules"); Rosen, *"Illiberal," supra* note 15, at 803 (referring to Kymlicka's classification of the Santa Clara Pueblo as illiberal due to the tribes' sexually discriminatory membership policy); Sunder, *Piercing the Veil*, *supra* note 29, at 1429 (employing the Santa Clara Pueblo as an example of a non-liberal culture due to the Supreme Court's decision in *Santa Clara Pueblo*); GUTMANN, *supra* note 99, at 44-56 ("A call for group sovereignty often amounts to a license for the dominant members of the group to impose injustice on others, even (as in the Martinez case) on a majority of the others.").

[133] *See, e.g.,* KYMLICKA, *supra* note 7, at 38-39 (arguing that limits on the application of the U.S. Constitution's Bills of Rights to Indian tribes "creates the possibility that individuals or subgroups

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relying on *Santa Clara Pueblo* to formulate critiques of illiberalism fully consider tribes' unique status in the American system. Much of this literature either neglects to thoroughly address the distinctive sovereign condition of Indian nations,[134] or fails to acknowledge the ramifications of full-scale imposition of dominant legal norms beyond the particular case at hand.

Admittedly, much of the illiberalism literature is devoted to examining the theoretical and philosophical implications of illiberalism, as well as justifications for liberal society's toleration – if not accommodation – of illiberal groups. Accordingly, it is not unreasonable that scholars in this field forego lengthy discussions of the various and particular legal regimes in which specific cases arise. Nevertheless, designating Indian tribes as illiberal while not offering an explanation of their anomalous status within the larger U.S. system creates a lacuna between the scholarship of illiberalism and the real-world functions of sovereign Indian governments. And, to the extent these scholars advocate for increased (U.S.) governmental intervention within tribal communities – as some do[135] -- a complete understanding of the overarching legal structure is vital to comprehend the enormous consequences of such proposals for Indian nations.

The fact that Indian tribal governments are outside the scope of the U.S. Constitution was of critical importance to the decision in *Santa Clara Pueblo*. As the Court recognized, Indian nations are subject to limited portions of the Bill of Rights only through Congress' enactment of the Indian Civil Rights Act, but not by virtue of the Constitution itself.[136] The implications of tribal nations' extra-constitutional status are vast: in essence, the unique historical circumstances which define the place of Indian tribes in the U.S. system means that, today, Indian tribes are the only governmental bodies in the United States that are not bound by the Constitution.

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within Indian communities could be oppressed in the name of group solidarity or cultural purity"); Sunder, *Piercing the Veil*, *supra* note 29, at 1429 (2003) (referring to *Santa Clara Pueblo* and arguing that "tribal sovereignty for Native Americans is yet another area in which "U.S. law defers to traditionalists within a culture over the claims of reformers"); GUTMANN, *supra* note 99, at 49-51.

[134] *Cf.* Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUMAN RIGHTS L. REV. 589 (2004).

[135] Sunder, *Piercing the Veil*, *supra* note 29, at 1407; *Cf.* KYMLICKA, *supra* note 7, at 164-170 (proposing that liberals ought not force illiberal societies to change, but ought to create incentives for them to become liberal).

[136] Discussed fully *infra* PART II. See Kymlicka, *supra* note _, at 38 (asserting that "as part of their self-government, tribal councils in the United States have historically been exempted from the usual constitutional requirement to respect the rights listed in the American Bill of Rights.").

This critical facet of Indian sovereignty is either misunderstood or is altogether absent from scholars' claims concerning the existing or proposed scope of federal judicial oversight of tribal governments. In advocating for increased federal intervention within Indian tribes, for example, one author acknowledges that readers must put "complicated issues of tribal sovereignty aside"[137] in order to embrace her interventionist proposals. Other scholars writing in this area attribute the absence of federal court review over tribal decisions to America's interest in "group solidarity" or "cultural purity", rather than fully addressing the unique sovereign status of Indian nations.[138] Other times, tribes are discussed in the same context as states, whose existence also pre-dates the adoption of the Constitution,[139] but which – unlike tribes – were brought within its ambit by virtue of the Fourteenth Amendment.[140]

Reading this scholarship, one might assume that Indian tribes' exclusion from the U.S. Constitution's domain constitutes a "special" accommodation afforded tribes by the dominant society in the name of benevolence or multiculturalism. Others might question why tribes, but not states, are excluded from the Bill of Rights. Within these writings, tribes' extra-constitutional status hardly even enters the fray. These works, which use *Santa Clara Pueblo* as a referent, ignore the *Santa Clara* Court's reliance on the U.S. government's pre-constitutional relationship with tribal governments, Constitutional provisions elucidating the distinct place of Indian peoples within the federal system, and over a century of Supreme Court precedent reaffirming tribal sovereignty and Indian differentness.[141] Without this history to frame

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[137] *Id*. at 560. ("To the extent women and others within the tribe are no longer willing to accept the tribe's norms, the state should recognize that by choosing to stay out of the conflict in the name of cultural autonomy, the state is in fact choosing a side in an internal debate. . . . [N]ormatively, the state should weigh in on the side of greater autonomy and equality, rather than on the side of repression.").

[138] *Id*. at 39.

[139] Kymlicka at 138 "[l]ike state governments, tribal governments were not historically subject to the federal Bill of Rights

[140] *See, e.g.,* Louis Henkin, *Selective Incorporation in the Fourteenth Amendment,* 73 YALE L.J. 74 (1963).

[141] In fact, the argument could be made that, in a country which is founded on Christian principles and that has afforded great deference to Christianity since its inception, Indian tribes and tribal religions have long suffered at the hands of the dominant regime and have not been afforded "special" protections at all. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that laws of general applicability can withstand Free Exercise Clause challenges, even when the law – in this case, prohibiting the use of peyote by members of the Native American Church in religious ceremonies – abrogates central tenets of the religion); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the Free Exercise Clause does not provide a basis for a tribe to stop government construction of a road through federal lands that would destroy an Indian sacred site); VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION, 30TH ANNIVERSARY EDITION (2003) (study of Native American religion as contrasted to Christianity).

the discussion, claims of purpotedly illiberal practices within Indian tribes are suspended in the ether, and the legal circumstances that shape contemporary realities are wholly misunderstood.

Other scholarship in this area (much of which also relies on *Santa Clara Pueblo*) refers to tribes as having no sovereign status at all, treating them as religious institutions or social clubs.[142] Examples include works that list Indian tribes in a string of non-sovereign groups, such as the Boy Scouts or Islamic fundamentalists.[143] One theorist contends that, for purposes of accommodating "distinctive communities" "[t]here is no apparent basis for distinguishing between Indians and . . . [the] Amish, or Orthodox Jews."[144] Even those advocating for the recognition of (even illiberal) group rights often do not make distinctions between Indian governments and non-sovereigns. One author, for example, advocates for the right of groups to self-govern, but includes Mormons, Mennonites, the Oneida, the Church of Scientology, and Theosophists along with Indian nations.[145]

At other times, the sovereignty of tribes is simultaneously acknowledged but misunderstood, in that it is treated as though it could plausibly inhere in a wide range of private associations. Here, sovereignty is too loosely ascribed, as Indian nations' status is conflated with the self-governance interests of non-sovereigns. For example, one author considers tribes' claims to self-governance along with those of the Amish, both of whom are then characterized as possessing "sovereign-like characteristics."[146]

Cf. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005) (examining the intersections of religion and law where conflicts emerge and arguing that, contrary to popular views, religion receives deference, not marginalization, in American law).

[142] *See, e.g.*, Sunder, *Piercing the Veil*, *supra* note 29, at 1429 (2003) (referencing *Santa Clara Pueblo* together with a case involving the Catholic University of America in regards to claims of judicial deference at the expense of liberal values); *see also* Rosen, *The Outer Limits, supra* note 33, at 1055-1059, 1061, 1081 (including Native American tribes in general and the Santa Clara Pueblo in particular in an analysis of "communities" attempting self-governance, whether the community was incorporated, utopian, religious, or residential).

[143] Sunder, *Cultural Dissent*, *supra* note _, at 560.

[144] Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 342-43 (1997) (While arguing that "[t]he accommodation of distinctive communities is an essential part of what it means to be a liberal society," he concludes that "[t]here is no apparent basis for distinguishing between Indians and . . . [the] Amish, or Orthodox Jews.").

[145] Rosen, *The Outer Limits*, *supra* note 33, at 1055-1059, 1061, 1081 (in advocating for the rights of subfederal groups to self-govern, Rosen examines communities without a historical and legal claim to sovereignty -- such as Mormons, Mennonites, the Oneida, the Church of Scientology, and Theosophists – along with Indian nations.).

[146] Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 827 (2002) (citing Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1039 (1983). In discussing Garet's work on the rights

Finally, much of the illiberalism literature asserts that tribal sovereignty – particularly as defined by *Santa Clara Pueblo* in relation to ICRA claims -- has been improperly employed to preserve illiberal cultures. Reflecting on *Santa Clara Pueblo*, one scholar writes that "[t]he call for group sovereignty often amounts to a license for the dominant members of a group to impose injustice on others . . .".[147] Another says of the case: "Tribal sovereignty for Native Americans is . . . [an] area in which U.S. law defers to traditionalists within a culture."[148]

These assertions – and others like them -- ignore the richly complicated history of U.S. – tribal relations and the vast import of tribal sovereignty. Specifically, it is simply erroneous to contend that a recognition of tribal sovereignty *per se* constitutes deference to traditionalists.[149] On the contrary, acknowledging tribal sovereignty simply means affirming the freedom of tribes as semi-autonomous bodies to make decisions regarding their internal governance with limited federal intrusion. The Pueblo's rule is only one of hundreds of membership rules maintained by tribes, many of which – although largely insulated from manipulation by the federal government due to tribal sovereignty[150] -- comport with Western notions of liberalism.[151]

Moreover, characterizing tribal sovereignty as a mechanism for cultural oppression by Indian tribes relies on a presumption that the dominant culture can and should remake Indian nations in its own image. After hundreds of years of forced assimilation – attempts at destroying Indian languages, criminalizing religions, taking sacred land, Christianizing leaders, and indoctrinating Indian children – Indian people know, perhaps better than others, that imposition from the outside simply does not move societies for the better. Today, many prominent liberal theorists agree that, as long as the basic liberal values of exit and

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of groups, Brody states that "he [Garet] cares more about groups with sovereign-like characteristics, focusing on 'traditional-group-village' cases involving the Amish and Native American tribes.").

[147] Gutman, *supra* note _, at 47.

[148] Brody, *supra* note _, at 1429-1430.

[149] *See infra* at Part _ (discussing the evolution of internal tribal self-government and the increased number of women leading Indian tribes in the past few decades).

[150] In fact, the federal government still maintains some control over tribal constitutions. The 1934 Indian Reorganization Act (IRA) authorized tribes to revitalize their governments by adopting boiler-plate constitutions subject to the approval by the tribal membership and the Secretary of the Interior. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §476 (2000). Many of these constitutions have built-in provisions that require constitutional changes to be approved by the Secretary of the Interior. Resnik, *Dependant Sovereign*, *supra* note _, at 712-14 .

[151] In fact, some tribes go further than the Federal government in affording formal equality. The Navajo Tribal Council, for example, voted in 1980 to adopt an Equal Rights Provision, explicitly requiring legal equality between the sexes. *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1138 (2004).

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dissent are present, it is counterproductive to impose foreign cultures onto minority groups.[152] True change can only come when driven by members of the self governing society.[153]

These examples provide a snapshot of the illiberalism literature that draws primarily (though not exclusively) on *Santa Clara Pueblo* to support claims of tribes as illiberal actors, but without full and complete explanations of the legal and historical foundations of Indian differentness. At times, these scholars advocate for expanding the ICRA to authorize federal court review of all ICRA decisions made by tribal courts. But the consequences of such proposals, beyond the immediate case at hand, are seldom contemplated. Nor is it acknowledged that many proposed expansions of the ICRA would swallow up Indian tribes and potentially eviscerate Indian tribal sovereignty altogether.[154]

As stated, this critique is not meant to imply that the contributors to the illiberalism literature misunderstand the nature and extent of tribal sovereignty. Given the philosophical underpinnings of the works in which these examples arise, it is clear that tribal sovereignty was not intended as a focal point. Nevertheless, scholars new to the illiberalism literature may be surprised to learn that Indian nations enjoy a legally-supported separateness from the dominant society.[155] And, without a proper explanation offered for that separateness, they might also take up the cause for intervention in the name of liberalism, without fully comprehending the stakes. Thus, I contend, understanding the legal, historical, and contemporary cultural components of tribal sovereignty is critical in comprehending how law has shaped in the past, and ought to continue to guide in the future, interactions between the federal and tribal governments. That is the subject of the following Part III.

III. UNDERSTANDING INDIAN NATIONS' SOVEREIGNTY[156]

[152] *See* Gutman, *supra* note _, at 50 (discussing Kymlicka and arguing against his position regarding internal change).

[153] KYMLICKA, *supra* note 7, at 167. Evidence shows that tribes are changing, from the inside out. *See infra* at PART IV. C.

[154] *Id*. at 559-560.

[155] I mean no disrespect. My own experiences indicate that even lawyers graduating from some of the most elite law schools in America are unaware of the existence of the "third sovereign." For a discussion of Indian nations as the "third sovereign", *see*, *e.g.*, Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 TULSA L. J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities--the Federal government, the States, and the Indian tribes.")

[156] In this section, I intentionally focus on the law of the United States in relation to Indian tribes to explain the current state of tribal sovereignty. This approach has been thoughtfully criticized by

As the illiberalism literature reflects, *Santa Clara Pueblo* has retained a great deal of influence and continues to stir controversy. Particularly, as tribes become more powerful in light of changing economic circumstances, the stakes in tribal membership for individuals have correspondingly increased.[157] Accordingly, tribal governments are subject to greater scrutiny now than in decades.[158] These related phenomena mean that it is critical for Indian nations' continued existence that outsiders understand the foundations and contemporary manifestations of tribal sovereignty.

Section A briefly chronicles the legal and historical foundations of tribal sovereignty. Section B turns the focus to an inexhaustive examination of tribal sovereignty "on the ground." It explores, in turn, the intimate, commercial, and governmental functions served by and encompassed within the Indian nations.

A. Historical and Legal Foundations of Tribal Sovereignty

Numerous scholars have thoroughly chronicled the landscape of tribal sovereignty.[159] In essence, tribal sovereignty means that Indian

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Indian law scholars who contend that it "concede[s] far too much authority to the United States at the expense of the Indian nations and their inherent sovereignty." Porter, *supra* note 60, at 1598.

[157] *See, e.g.,* Eric S. Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 451 (2003) ("By the year 2000, gross revenues from Indian gaming exceeded $10.6 billion … an increase of more than two thousand percent over twelve years…. The extraordinary expansion of the Indian gaming industry--most notably its mushrooming revenues--has caused various disputes among tribal members, tribes, states, and the federal government." (Footnotes omitted)).

[158] *See, e.g.*, *History of the Committee on Indian Affairs*, U.S. Senate Committee on Indian Affairs, *available at* http://indian.senate.gov/cominfo.htm (last visited Feb. 10, 2006) (detailing the growth, expansion, and establishment of the U.S. Senate Committee on Indian Affairs over the last twenty-five years); ExpectMore.gov, the Office of Management and Budget and Federal Agencies, *available at* http://www.whitehouse.gov/omb/expectmore/summary.10001091.2005.html and http://www.whitehouse.gov/omb/expectmore/summary.10001082.2005.html (detailing the current Executive Branch's critique of tribal courts and tribal law enforcement) (last visited Feb. 12, 2006).

[159] *See, e.g.*, Frickey, *supra* note 88, at 438 (2005) ("By authorizing Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes," the Constitution places tribes in the same category as acknowledged sovereigns and recognizes that tribes are sovereigns distinct from the United States but nonetheless suggests that they are not foreign nations."); Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated and Re-empowered*, 2005 UTAH L. REV. 443, 455 (2005) ("Tribes resemble foreign countries because they have dominion over their lands and members. But, unlike foreign nations, with which the federal government deals at arm's length, they are subject to the paramount sovereignty of the federal government."); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1189-90 (2004) (The framework of federal law is inescapable, yet federal law renders tribal sovereignty a fragile concept, resting vulnerably in the hands of potentially

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tribes enjoy inherent rights of self-government over their members and retained territories, unless Congress has expressly abrogated such rights.[160] Tribal sovereignty is embodied in hundreds of treaties between Indian nations and the U.S. government, referenced in the United States Constitution, and affirmed and recognized by a vast body of Supreme Court jurisprudence and Congressional acts.

1. Recognizing Indian Nations' Sovereignty

Tribal nations predate the national and state governments. Before the United States was even formed, treaties governed the relationship between the Indian nations and colonial powers.[161] The authority to make treaties, of course, lies exclusively with states. Thus, treatment of Indian nations as sovereigns, both in a historical and legal sense, is virtually indisputable, "given the long track record of diplomatic interaction between the European colonial governments and the Indian nations."[162] In forming treaties with the national government, tribal nations became participants in a sovereign-to-sovereign relationship with the colonial powers, which took on the role of protector of Indian tribes.[163]

Treaties with Indian nations spanned a wide variety of topics: resolving boundary disputes, defining hunting and fishing rights, and keeping the peace between sovereigns.[164] In the peace treaties in

unconstrained federal courts that articulate a nebulous common law and legislators who exercise an insufficiently constrained plenary power. The commentary on this unsatisfactory state of doctrinal affairs is extensive."); Dan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 75 (2003) (discussing how current economic activities may create additional disputes regarding tribal sovereign authority); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 815 (1996) ("The essential claim of tribal Indians that distinguishes them from other groups is their claim of sovereignty -- the inherent right to promulgate and be governed by their own laws.").

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[161] Porter, *supra* note 60, at 1600.

[162] *Id*. at 1601. I do not mean to imply by this statement that Indian nations' sovereignty is dependant on the views of the dominant society; rather, in this case, that treatment acts as further evidence of the dominant society's recognition of inherent tribal sovereignty.

[163] Tebben, *supra* note 63, at 327.

[164] *See, e.g.,* TREATY BETWEEN THE UNITED STATES AND THE WYANDOT, DELAWARE, CHIPPEWA, AND OTTAWA NATIONS, JAN. 21, 1785, ART. III, 7 STAT. 16, 17 (Setting forth the boundary line between the United States and the Wiandot and Delaware nations); *U.S. v. Winans*, 198 U.S. 371 (1905) (adjudicating the Yakima Nation's right to fish upon the Columbia river as set forth in the treaty between the United States and the tribe); TREATY BETWEEN THE UNITED STATES AND THE DELAWARE NATION, SEPT. 17, 1778, ART. II, 7 STAT. 13, 13 (wherein the Delaware Nation and United States agreed to "a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations . . ."); *see also* Porter, *supra* note 60, at 1600-02.

particular, tribes oftentimes ceded land to the Americans, but reserved all rights not expressly ceded.[165] The Supreme Court has recognized this as the "reserved rights" doctrine, making clear a treaty was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those rights not granted.[166] The reserved-rights doctrine reveals much about Indian sovereignty: "Because tribal sovereignty is understood as being retained from a tribe's inherent, preconstitutional sovereignty rather than consisting of delegated power, the exercise of this sovereignty does not entail any federal or state action that would trigger the Constitution."[167]

Application of the doctrine can be seen in an early Supreme Court case wherein the Court interpreted a Cherokee treaty.[168] The Court rejected the view that the treaty represented a complete cession of Indian sovereignty.[169] To the contrary, it articulated the Indian "canons of interpretation" to protect tribes from inadvertent loss of important rights.[170] The canons encompass three fundamental principles: treaties must be interpreted as the Indians would have understood them, liberally in favor of the Indians, and as preserving Indian rights.[171] The canons of interpretation follow from the reserved-rights theory, in that they direct the inquiry towards "what rights the Indians intended to cede, not what allocation of interests federal negotiators intended or treaty language suggested."[172]

The treaty relationship between the tribes and the United States – stepping into the shoes of the prior colonial powers – continued until the late 1800's.[173] In the meantime, the United States Constitution was drafted and adopted. At the time of its creation, Indian nations, with inherent sovereignty over their people and territories, were already

[165] Frickey, *supra* note 88, at 439 (2005) (wherein Frickey explains the reserved rights doctrine and points to it as the source for the term "Indian reservation").
[166] *U.S. v. Winans*, 198 U.S. 371, 381 (1905).
[167] Frickey, *supra* note 88, at 440.
[168] *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832). For a complete discussion of *Worcester*, *see infra* at pp _-_.
[169] *Id*. at 552-54. *See* Frickey, *supra* note 88, at 439 ("The treaties involved in *Worcester* contained several clauses that could have been read as representing a complete cession of Cherokee sovereignty.").
[170] Frickey, *supra* note 88, at 446. In fact, Frickey argues that, in deciding *Santa Clara Pueblo*, the Supreme Court recognized that membership decisions were at the core of tribal self-government, and, accordingly, applied the Indian law canons to hold that habeas corpus was the only federal judicial remedy for an ICRA violation.
[171] *Worcester*, 31 U.S. (6 Pet.) at 553-54; *see* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1103 (2005).
[172] Frickey, *supra* note 88, at 440.
[173] *Id*. at 441.

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established in the United States.[174] Thus, the U.S. Constitution does not apply to regulate the conduct of Indian tribal governments.[175] And tribes have never formally been incorporated into the American federal-state system.[176] But the Constitution does expressly mention Indian tribes three times. Specifically, it empowers Congress to regulate commerce with the Indian nations and authorizes the President and the Senate to make treaties with them.[177]

Supreme Court jurisprudence, reaching back to the 19th century, also laid the groundwork for an understanding of the unique sovereign rights of Indian nations. In *Cherokee Nation v. Georgia*,[178] the first case in which the Supreme Court entered into a lengthy discussion regarding the legal status of Indian tribes, the Court acknowledged the anomalous relationship between the U.S. government and the Indian tribes.[179] In attempting to ascertain whether it had jurisdiction under the Constitution to hear a case brought by an Indian tribe against a state, the Court initially defined the Indian tribe as " a distinct political society, separated from others, capable of managing its own affairs and governing itself."[180]

As Indian law scholar Philip Frickey explains, actions of the United States evinced its belief in this status for tribes, having entered into numerous treaties with them and having enacted legislation consistent with this understanding.[181] The Court nevertheless found the language of the Indian Commerce Clause inconsistent with a designation of tribes as "foreign" nations. That language – stipulating that Congress could regulate commerce "with foreign Nations . . . *and* with the Indian Tribes"[182] – supported this view.[183] Further evidence against finding

[174] *See* Porter, *supra* note 60, at 1600.
[175] *Id*. at 1596 n. 1 (citing to *United States v. Lara*, 124 S. Ct. 1628, 1636 (2004) which states that "the Constitution does not dictate the metes and bounds of tribal autonomy"; *United States v. Wheeler*, 435 U.S. 313, 326-27 (1978) concluding that the Double Jeopardy Clause of the U.S. Constitution is inapplicable due to the inherent sovereignty of Indian nations; and *Talton v. Mayes*, 163 U.S. 376, 381-82 (1896) concluding that the jury trial provisions of the Fifth Amendment to the U.S. Constitution are inapplicable due to the inherent sovereignty of Indian nations.).
[176] Frickey, *supra* note 88, at 436.
[177] U.S. Const. art. I, § 2, cl. 3; Frickey, *supra* note 88, at 438 (The Constitution also contains an exclusion of "Indians not taxed" from state population rolls for purposes of representation in the House of Representatives. The phrase, "Indians not taxed" refers to unassimilated tribal Indians, a term which, according to Frickey, "applies to no one today.").
[178] 30 U.S. (5 Pet.) 1 (1831).
[179] *Id*. at 16 (stating that "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."); *see also* Frickey, *supra* note 88, at 437.
[180] *Id. See* Frickey, *supra* note 88, at 437.
[181] Frickey, *supra* note 88, at 437.
[182] U.S. Const. art. I, § 8, cl. 3. (Emphasis added).
[183] Tebben, *supra* note 63, at 322.

tribes to be foreign nations was their practical situation and status.[184] After all, tribes existed within the boundaries of the United States, were not considered independent sovereigns by foreign powers, and had, in fact, entered into treaties in which they acknowledged being under the protection of the United States.[185] In light of these characteristics, the Court labeled tribes "domestic dependent nations."[186]

The term "domestic dependent nation" is conflicted and complicated. In fact, as Frickey points out, it initially seems oxymoronic.[187] But there is Constitutional support for viewing tribes both as domestic/dependent and sovereign.[188] The Indian Commerce Clause provides some support for this view. After all, by authorizing Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes,"[189] the Constitution simultaneously recognizes tribes as sovereigns distinct from the United States, but also suggests that they are not foreign nations.[190]

Subsequent Supreme Court jurisprudence from the same era affirms the view of tribes as sovereigns. One year after the Court's decision in *Cherokee Nation*, the Court decided the case of *Worcester v. Georgia*.[191] *Worcester* arose because of a power struggle between the United States government and the State of Georgia, which sought to interfere with the Cherokee Nation's treaty-based right to be free from state criminal jurisdiction within its borders.[192] Chief Justice Marshall held that tribal nations were "independent, political communities, retaining their original natural rights,"[193] and that the federal-tribal relationship precluded any state role in Indian affairs.[194] In so holding, the Court concluded that Georgia's attempt to exercise authority over the Cherokee reservation violated federal law.[195]

These two cases, *Cherokee Nation* and *Worcester*, provide the judicial foundation for the recognition of tribes' inherent, retained sovereignty. In conjunction, the cases acknowledge that tribes are

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[184] *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.
[185] *Id*. *See* Frickey, *supra* note 88, at 438.
[186] *Id*. *See* Frickey, *supra* note 88, at 438.
[187] Frickey, *supra* note 88, at 438.
[188] *Id*.
[189] U.S. Const. art. I, § 8, cl. 3.
[190] U.S. Const. art. I, § 8, cl. 3. *See* Frickey, *supra* note 88, at 438.
[191] 31 U.S. (6 Pet.) 515 (1832).
[192] *Id*. *See* Tebben, *supra* note 63, at 330-31.
[193] *Id*. at 519.
[194] *Id*. at 515. *See* Frickey, *supra* note 88, at 438.
[195] *Id*. at _.

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sovereign, domestic nations, retaining their original natural rights, but with dependence upon the national government for protection.[196]

Since *Worcester*, the Supreme Court has repeatedly recognized the sovereignty of Indian nations and has reiterated the federal government's policy of advancing Indian self-determination and self-governance.[197] In a long line of cases, the Court has acknowledged that Indian nations' sovereignty "long predates that of our own Government"[198] and it has emphasized the right of tribes to "make their own laws and be ruled by them."[199] Supreme Court jurisprudence strongly affirms the inherent, sovereign rights of tribal governments to, *inter alia*: make substantive laws to regulate internal affairs;[200] create tribal court systems;[201] set tribal membership requirements;[202] set criminal penalties for tribal members;[203] impose sales tax upon transactions occurring on the reservation;[204] tax oil and gas extraction on the reservation;[205] tax non-Indian leasehold interests on the reservation;[206] resolve internal disputes in a tribal forum;[207] decide disputes involving outsiders in a tribal forum;[208] and prosecute Indians for crimes committed on the reservation, among others.[209]

Finally, though Congress certainly does not serve as a source of tribal rights, Congressional acts have also reinforced and reinvigorated conceptions of Indian self-government.[210] Of significance is the 1934

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[196] Tebben, *supra* note 63, at 332.

[197] In fact, the Supreme Court's docket has been, somewhat surprisingly, peppered with Indian law cases, even though only one to two percent of the United States' population is Native. *See* Tebben, *supra* note 63, at 333 ("Cases involving issues of tribal sovereignty are now commonplace in the caseload of the Supreme Court . . ."). One reason put forth for this phenomenon is that the Supreme Court itself is grappling with the complicated conflicts that arise due to Indian nations' unique sovereign status. *See, e.g.,* Frickey, *supra* note 88, at 445.

[198] *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

[199] *Williams v. Lee,* 358 U.S. 217, 220 (1959).

[200] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *See* Tebben, *supra* note 63, at 333.

[201] *Talton v. Mayes*, 163 U.S. 376 (1896). *See* Tebben, *supra* note 63, at 333.

[202] *Roff v. Burney*, 168 U.S. 218 (1897). *See* Tebben, *supra* note 63, at 333.

[203] *United States v. Wheeler*, 435 U.S. 313 (1978). *See* Tebben, *supra* note 63, at 333.

[204] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 135 (1990). *See* Tebben, *supra* note 63, at 333.

[205] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). *See* Tebben, *supra* note 63, at 333.

[206] *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985). *See* Tebben, *supra* note 63, at 333.

[207] *Williams v. Lee*, 358 U.S. 217 (1959). *See* Tebben, *supra* note 63, at 333.

[208] *Id.*

[209] *U.S. v. Lara*, 541 U.S. 193 (2004).

[210] Although Congress can add to, or restore, tribal rights. *See, e.g.,* 25 U.S.C.A. §1301(2) (in which Congress overruled the Supreme Court case of *Duro v. Reina*, and defined tribal powers of self-government to include "the inherent power of Indian tribes, hereby recognized and affirmed to exercise criminal jurisdiction over all Indians.")

Indian Reorganization Act,[211] which renewed support for tribal self-governance and ended a period of allotment and assimilation.[212] Similarly, Congress has passed other important legislation on behalf of Indian tribes. For example, the Indian Child Welfare Act of 1978[213] (giving tribal communities control over the adoption of Indian children[214]) and the Native American Graves Protection and Repatriation Act[215] (protecting the human remains, sacred objects, and cultural patrimony of indigenous peoples) reaffirm the federal government's trust responsibility to Indian nations. These laws, and others,[216] demonstrate the U.S. government's desire to legislate in furtherance of tribal rights,[217] as well as reinforce federal support for Indian self-determination and self-government.[218]

2. Limiting Tribal Sovereignty

Although the Constitutionally based treaty relationship, Congressional action, and Supreme Court precedent have repeatedly reaffirmed the inherent sovereignty of Indian nations, in some respects they have also limited it.

For tribes, treaties were quasi-Constitutional documents.[219] But to the colonial powers, they too often represented attempts by the

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[211] Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified as amended 25 U.S.C. §§ 461-479 West 2001 and Supp. 2005)).
[212] Frickey, *supra* note 88, at 444.
[213] 25 U.S.C. §§ 1901-1963 (1983).
[214] 25 U.S.C. § 1915 (a)-(b).
[215] 25 U.S.C. §§ 3001-3013 (1991).
[216] *See*, *e.g.,* Indian Self-Determination and Education Act, Pub. L. No. 93- 638, 88 Stat. 2203 (1975) (reinforcing Indian self-determination by giving Indian nations more of a direct role in administering tribal programs).
[217] *See* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 214 (2000) ("The ICWA and NAGPRA are merely two examples of a growing recognition in the legislature that even in an era of self-determination, the federal government and Indian nations must honor their mutual, ongoing trust relationship.").
[218] Frickey, *supra* note 88, at 444 (In addition, although the Indian Civil Rights Act of 1968 certainly has "assimilative features," it did amend a previously passed Congressional law to require tribal consent before allowing statues to assume jurisdiction over Indian Country). *Cf.* Babcock, *supra* note 159, at 496 (noting that tribes found the imposition of ICRA to be antithetical to tribal sovereignty and destructive to tribal ways of life. Notably, ICRA changed the social structure of some tribes from a focus on the interconnected good of the whole – achieved through each tribal member recognizing his or her own layers of responsibility to the group and to tribal life – and shifting that focus onto the individual who could feasibly be pitted against the tribal government.)
[219] *See generally* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800, 98-123 (1997) (discussing treaties as constitutions).

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government to advance the immediate goals of an encroaching white society.[220] Thus, many treaties were breached by the federal government, some within days of their enactment.[221] With few exceptions, treaty negotiations can be generally characterized by unequal bargaining power, fraud on the part of the federal government or its agents, or the presentation of a Hobson's choice for the Indian nations.[222] And, in 1871, Congress ended treatymaking with tribes.[223] The abandonment of the treatymaking process "cut against the notion of tribes as sovereigns."[224]

Additionally, much of the chipping away of tribal sovereignty and Indian rights has come in the form of the dubious doctrine of Congressional plenary power over Indian affairs.[225] Pursuant to the Indian Commerce Clause, Congress and the Supreme Court have worked in tandem to expand Congress' authority over Indian affairs.[226] This extraordinary control was clarified by the Supreme Court in the infamous case of *Lone Wolf v. Hitchcock*,[227] wherein the Supreme Court declined to reel in Congress' unilateral abrogation of a treaty with the Kiowa tribe. The Supreme Court held that Congress' abrogation of the treaty raised a nonjusticiable political question, stating: "[p]lenary

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[220] Babcock, *supra* note 159, at 460-61.

[221] Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"--How Long a Time Is That?*, 63 CAL. L. REV. 601, 611 (1975) ("Breach by the United States was common; in one case a treaty was respected for only 12 days before it was violated by the government negotiator."). Of course, Congress' power to abrogate treaties is not limited to Indian tribes. Congress also has the authority to abrogate treaties with foreign nations, and it has readily done so. *See United States v. Chae Chan Ping*, 130 U.S. 581 (1889).

[222] ALEXANDER DE TOQUEVILLE, DEMOCRACY IN AMERICA 649 (Henry Reeve trans., Longmans, Green & Co. 1889) (1838) (asserting that the government rarely acquired Indian lands through treaty negotiations represented by fair, arm's-length transactions, but that "[m]ost of the time, the government acquired lands by a combination of coercion, fraud, threat of force, or actual military force."). *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005) (arguing that the massive lost of land by Indians in America was due, in large part, to the settlers' power to establish the legal instiutitons and rules by which land transactions would be made and enforced).

[223] Frickey, *supra* note 88, at 441.

[224] *Id*.

[225] Nell Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 PA. L. REV. 195 (1984) (arguing that "[t]he judiciary's frequent invocation of federal plenary power is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs."). *See* Tebben, *supra* note 63, at 337 ("The constitutional basis for congressional plenary power over tribal governments outside the realm of commerce is vulnerable to challenge."); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1141 (1990) (noting that "the plenary power doctrine rests on tenuous foundations").

[226] Tebben, *supra* note 63, at 337 (explaining that while the Commerce Clause does authorize Congress to regulate commerce with Indian Tribes, the Constitution does not authorize plenary power over tribal governments).

[227] 187 U.S. 553 (1903).

authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[228]

Since *Lone Wolf*, the Supreme Court has assumed that Congress does, in fact, have the power under the Indian Commerce Clause to manage Indian affairs.[229] Accordingly, the Supreme Court has upheld the numerous attempts by Congress to assimilate, remove, or even terminate Indian tribes. These include congressional policies on removal from tribal homelands,[230] the mandated break up of tribal lands into individual allotments,[231] renegation of treaty rights,[232] and forced termination of federal-tribal relations,[233] which all allegedly fell under Congress' power to regulate commerce with the Indian nations.[234]

Finally, despite numerous decisions affirming tribal sovereignty, the Supreme Court, too, has had a hand in its dismantling. Several scholars now contend that "it is the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty."[235] In the past few decades, the Court has held that tribes do not have the ability to prosecute non-Indians who commit minor offenses on tribal lands,[236] to exercise civil jurisdiction over tribal members' claims of wrongful

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[228] *Id*. at 565.
[229] *Id*.
[230] Act of May 28, 1830, ch. 148, Stat. 411. *See* Tebben, *supra* note 63, at 336.
[231] 25 U.S.C. § 331 (repealed 2000). *See* Tebben, *supra* note 63, at 336.
[232] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). *See* Tebben, *supra* note 63, at 336.
[233] 25 U.S.C. §§891-902 (repealed 1973). *See* Tebben, *supra* note 63, at 336.
[234] Tebben, *supra* note 63, at 336.
[235] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) (explaining how recent Supreme Court decisions, rather than congressional action, have eroded tribal sovereignty). Over the past twenty years, U.S. Indian law scholars have been vocal critics of the Supreme Court's assault on tribal sovereignty. *See, e.g.,* Frickey, *supra* note 88, at 490 (explaining that "for the past three decades, the highest court of the United States has been on a decisional path that undercuts tribal prerogatives, and recently several Justices openly challenged the notion that tribes should be recognized as self-governing in the first place."); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 290 (2001) (contending that the Supreme Court has made "radical departures from the principles of Indian law" in its unrelenting attack on tribal sovereignty); Joseph William Singer, *Canons of Conquest: The Supreme Court Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003) (asserting that, "[o]ver the last twenty years, the Supreme Court has led a massive attack on tribal sovereignty"); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 409 (2003) (stating that "[t]oday, the eviscerating potential of the Court's Indian law decisions provokes a real and palpable fear among tribal nations for their future existence").
[236] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

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searches and seizures on tribal lands by state officials,[237] or to control the zoning of land held by non-Indians within a tribe's borders.[238]

But limitations on tribal sovereignty, however damaging, have not destroyed the living sovereignty of Indian nations.[239] Each day, on the ground, hundreds of Indian tribes give life to tribal sovereignty through everyday actions. Spanning every facet of life from the most basic and fundamental – birth, death, marriage, divorce, and prayer – to the most sophisticated and specialized – policing of members, dispute resolution, and incarceration – Indian tribes live their sovereignty in real and tangible ways each and every day. Tribal sovereignty "on the ground" is discussed fully in the next Section.

B. Tribal Sovereignty on the Ground

This article has laid out the framework regarding illiberal groups' freedoms within the United States. (American) Constitutional governments – federal, state and local – are bound not to act illiberally. But most private associations – as long as they encompass rights of exit and dissent – have some constitutional protection for illiberal association.[240] As demonstrated, Indian tribes cannot neatly be placed within this system. Their status is anomalous. In some respects, tribes possess qualities unique to the very most intimate associations of the human experience –families and marriages – while, on the other hand, they function as sovereigns with the full panoply of sovereign rights, including incarceration and banishment.[241]

To shed light on the inner workings of tribal sovereignty, this section describes various aspects of tribal sovereignty on the ground. In practice, tribal sovereignty encompasses virtually every component of tribal life within Indian Country. This section focuses on only three facets of an Indian tribe's existence: its intimate, commercial and governmental functions.

1. Intimate Functions

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[237] *Nevada v. Hicks*, 533 U.S. 353 (2001)
[238] *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).
[239] Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 118-122 (2005) (discussing the "living sovereignty" of American Indian nations) [hereinafter *"Straight Stealing"*].
[240] *See supra* PART I.B.
[241] *See* Frickey, *supra* note 88, at 479; *see also United States v. Mazurie*, 419 U.S. 544, 557 (date) "[Indian tribes] are a good deal more than private, voluntary organizations."

In many respects, Americans – and other liberal cultures – have voluntarily traded governmentally-enforced freedom in the public sphere for freedom from governmental interference in the private spheres of culture, religion and family.[242] Governmental non-interference in family matters is a core tenet of a liberal society.[243] Decades of Supreme Court precedent has affirmed that families and individuals within them are guaranteed certain rights of privacy to live beyond the reach of the state.[244] In this respect, Indian tribes reflect the most intimate associations in the human experience: they are, by definition, families.[245] Indian tribes are bound by bloodlines, clan identifiers, and kinship.[246] Ancestry or descent often constitutes the dominant factor in determining whether one belongs to an Indian tribe.[247] The political loyalties of individual Indians, too, is often shaped around these identifiers.[248] Some scholars maintain that family structure is the defining characteristic of Indian tribes.[249]

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[242] *See, e.g.,* Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982) ("The distinction between public and private connects with a central tenet of liberal thought: the insistence that because individuals have rights, there are limits on the power of government vis-a-vis the individual. Public and private are the descriptive labels [used] to distinguish spheres or clusters of activities that are presumptively outside the legitimate bounds of government coercion and regulation (the private sphere) from those where government has a legitimate role (the public sphere).").

[243] *See* RICHARD F. GALVIN, MORAL PLURALISM, DISINTEGRATION, AND LIBERALISM, IN THE LIBERALISM-COMMUNITARIANISM DEBATE at 39 ("One hallmark of a liberal society is the stipulation that there are spheres of conduct that lie beyond the limits of legitimate government interference. . . ").

[244] "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). "We deal with a right of privacy older than the Bill of Rights…" *Id.* at 486. "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 852 (1992) (citing *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977)). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 847. "The petitioners [as adult, consenting homosexuals] are entitled to respect for their private lives…. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

[245] *See, e.g.*, G. Kenneth Reiblich, *Indian Rights under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 623-24 (1968) ("Indian tribes [are] more like families than governmental units . . .").

[246] *See* Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373, 1390 (2002) [hereinafter *Descent*].

[247] *Id*. at 1390.

[248] *See* Babcock, *supra* note 159, at 540.

[249] *See, e.g*., Reiblich, *supra* note 245, at 623-24.

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As a natural extension of the family structure, tribal nations also constitute intricate social networks. Given that many families can trace their roots within a tribal society back dozens of generations, the typical tribal nation is composed of groups of people (usually families or clans) who have interacted consistently with other families over centuries.[250] This history is deeply embedded within tribal nations, and it serves as the framework within which tribal people socialize, marry, worship, and, sometimes, feud.

Some Indian tribes also serve as religious institutions. Because, as this article has explained, the Establishment Clause was not imposed upon Indian tribes through the ICRA, several tribes have maintained pre-contact religions.[251] These tribal nations – like the Pueblos, the Hopi, the Onondaga and the Meskwaki, for example – are structured theologically.[252] This means that the government operates as a theocracy, and tribal leaders are chosen because of their positions as respected religious leaders within the tribe.[253] Within such theocracies, all aspects of tribal culture – marriage, membership, family, leadership, and governance – are infused with religious meaning. The religion, the government, the culture and the people are all one.[254]

Tribes are also repositories of unique, ancient and threatened cultures.[255] With hundreds of Indian tribes in the United States, the cultural diversity found among Indian tribes is vast. The indigenous peoples of North America possess working knowledge of pre-contact religions, medicinal remedies, burial traditions and sacred practices.[256] Hundreds of ancient languages and ceremonies are kept alive in flourishing, functioning tribal communities.[257]

2. Commercial Functions

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[250] Goldberg, *Descent*, *supra* note 246, at 1391-92 ("At gatherings of Navajo, for example, individuals asked to introduce themselves typically identify not only the clan of which they are born, but also the connected clans to which they owe sacred obligations.")

[251] *See supra* PART II.

[252] Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 273 (1997).

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[255] *See* Riley, *"Straight Stealing," supra* note 239, at _.

[256] *See generally*, Riley, *"Straight Stealing," supra* note 239, at 109-115 (discussing cultural resource programs and cultural preservation codes in indigenous communities which set out to protect and, in some cases, revitalize indigenous languages, sacred sites, burial practices, natural resources, traditional medicines and ceremonies).

[257] *Id*. at 109-11.

For decades, Indian tribes have owned and operated tribal businesses.[258] Though the public's perception of Indian commerce is the casino, in reality, tribes have long engaged in a plethora of commercial enterprises.[259] Tribes own auto-parts plants, timber management services, printing businesses, mills, grocery stores, golf courses, and ski resorts, to name but a few.[260] They are actively engaged in media outreach to tribal members and surrounding communities, investing in newspapers, radio stations,[261] and commercial telecommunications ventures.[262]

Undoubtedly, the gambling industry has helped to further expand tribal holdings.[263] Today, tribes are catering to their visiting, non-Indian guests by developing hotels, resorts, restaurants and other tourist attractions.[264] In fact, gaming tribes alone contributed $32 billion in revenue, $12.4 billion in wages, and 490,000 jobs to the U.S. economy in 2001.[265] And those numbers are clearly growing.

This increased economic development also means more and more tribes employ greater and greater numbers of people.[266] In America today, thousands of people, both Indian and non-Indian, are employed by Indian tribes.[267] Some tribes have expanded commercial enterprises

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[258] *The Next Generation*, FORTUNE Special Sections, March 7, 2005, at http://www.timeinc.net/fortune/services/sections/fortune/corp.html(describing various business ventures of Native American tribes, including: the Chickasaw Nation's AM/FM radio station; the Shakopee Mdewakanton Dakota Sioux tribe's Dakotah Sport and Fitness Club; the Mille Lacs Band of Ojibwe Woodlands National Banks; the Santa Ana Pueblo's store specializing in Native American foods; the Sandia Pueblo's market center specializing in Native American art; the Oneida Indian Nation's newspaper; the Winnebago Tribe's gas stations; and the Mississippi Band of Choctaw's printing press). (last visited February 13, 2005)

[259] *Id.*

[260] *See* R. Spencer Clift, III., *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 189 (2002-2003) (describing commercial ventures of Indian tribes, including "smokeshops, fuel stations, convenience stores, casinos, hotels, golf courses, agribusiness, and banks on more than 300 Indian reservations located throughout the United States."); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("The Mescalaro Apache Tribe operates a ski resort in the State of New Mexico, on land located outside the boundaries of the Tribe's reservation."); LIGHT AND RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 103 (2005); *U.S. Dept. of Labor v. Occupational Safety & Health Review Commission*, 935 F. 2d 182 (9th Cir. 1991) (describing the timber industry of the Warm Springs tribes).

[261] *See supra* note _.

[262] Gabriel S. Galanda, *Insuring Indian Country*, 35-FALL BRIEF 32, 32 (2005).

[263] *See* LIGHT AND RAND, *supra* note 260, at 103 (stating that tribes have used casino revenues to open restaurants, hotels, printing businesses, and invest in commercial real estate.)

[264] *See id*.

[265] Galanda, *supra* note _, at 32.

[266] *See* LIGHT AND RAND, *supra* note 260, at 103.

[267] *See* LIGHT AND RAND, *supra* note 260, at 103.

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to the point that they are now among the largest employers in the regions or states in which they're situated.[268]

3. Governmental Functions

Indian tribes are governments. Most tribes enact, enforce and live by their own tribal laws (either oral or codified), which apply to all tribal members.[269] Criminal laws are enforced by tribal police, many of whom are cross-deputized with state or local law enforcement officials.[270] Some tribes employ tribal prosecutors who prosecute crimes committed by Indians on the reservation.[271]

Disputes are resolved through indigenous justice systems. Some tribes use their tribal council for this purpose, while others rely on elders or clan leaders to settle matters.[272] Many tribes also have tribal courts to adjudicate both intra-tribal disputes and disputes that arise on the reservation involving non-members.[273] The structure of such courts varies widely. Trial courts, appellate courts, Peacemaker courts, talking circles, drug courts, and specialized courts for domestic violence or child custody matters can all be found in Indian Country.[274] All are overseen and operated by tribal governments.

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[268] *See* LIGHT AND RAND, *supra* note 260, at 103; Matthew L. M. Fletcher, 82 *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, U. DET. MERCY. L. REV. 1, 45(2004) (noting that Michigan Indian tribes with gaming operations are often the largest employer in their regions).

[269] *See* Riley, *"Straight Stealing," supra* note 239, at 92 ("American Indians govern themselves by tribal law through various institutional forms, including, among others, tribal councils, tribal courts, and tribal peacemaking systems.").

[270] Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1440 (1997) (describing how tribal police members may be cross-deputized with state officials to facilitate cooperation among law enforcement).

[271] Porter, *supra* note 60, at 1613 (explaining that more attorneys are becoming involved in Indian nations, serving as tribal general counsels, tribal prosecutors, tribal judges, defense counsel and general private practitioners.)

[272] Nell Jessup Newton, *Tribal Courts Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 309 (1998) (describing the Winnebago traditions of "family, clan or council deliberations" to resolve disputes).

[273] *Id*. at 294 (describing the courts of gaming tribes, who frequently hear cases brought by non-Indians).

[274] *See, e.g.,* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 592-653 (2000) (discussing various tribal courts and resolution processes, including tribal and appellate courts, family gatherings and talking circles, and restorative justice methods for dealing with domestic violence and child custody matters); Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997-2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2002) (discussing the successful development of the drug court on the Duckwater Shoshone Indian Reservation); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 252 (1994) ("The Navajo Peacemaker court is

Like any other government, tribes undertake all basic governmental functions. An Indian living with her tribe may avail herself of services such as: housing and housing assistance (both on and off the reservation), health care benefits, education (from pre-school to the graduate level), and day care facilities owned and operated by tribal members.[275] With tribally owned and operated gas stations, banks, grocery stores, fitness centers, gift shops, printing presses, newspapers and radio stations, tribal members can oftentimes access all their daily necessities through tribal government or tribal businesses.[276] For an Indian who lives, works, socializes, exercises, and worships on a reservation, there is no other government that has a larger role in that Indian's day to day life than her tribe.

Among the tribal nations' many governmental functions are those powers reserved specifically for groups with sovereign rights: namely, the fundamental power of government to arrest, prosecute and incarcerate those who break their rules.[277] Along with the powers of exile and exclusion, these are perhaps the most important powers of the tribal nation, further distinguishing them from private groups.[278]

IV. ASSESSING COSTS OF THE ICRA'S EXPANSION INTO INDIAN NATIONS

Tribes are not only anomalous as compared to the federal and state governments, but there is also a vast range of structures and systems of governance within tribal communities.[279] There are over 500 federally recognized Indian tribes in the United States – including Alaska, which has over 200 tribal Villages.[280] Indian nations apply and are bound by

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part of the judicial system; when parties consent to or seek its resolution process, the dispute is converted from a criminal matter into a civil case.").

[275] Gover, Stetson, and Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277, 294 (1991) (describing the Puyallup Tribe of Indians' use of trust fund income for "housing, elderly needs, burial and cemetery maintenance, education and cultural preservation, supplemental healthcare, daycare, and other social services.").

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[277] *See* Frickey, *supra* note 88, at 479.

[278] Brody, *supra* note **Error! Bookmark not defined.**, at 830.

[279] *See* Riley, *"Straight Stealing," supra* note 239, at 74 ("Tribal cultures are not all alike; tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot").

[280] *See* Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46, 327-33 (July 12, 2002); Federally Recognized Indian Tribes, at http://www.artnatam.com/tribes.html (last visited June 11, 2004); DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 11 (5th ed. 2005).

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their own tribal laws,[281] which can vary greatly from one community to another.[282] Like the states and the federal government, in many tribes a written constitution serves as the governing legal document and the source for many tribal rights.[283] But there are also tribes that are governed entirely by tribal codes, with no written constitution,[284] as well as those that maintain traditional theocratic governments.[285] Many others operate through clans, tribal councils, or chiefs.[286] Some have laws and structures that are intentionally kept secret from the dominant society, either because secrecy is mandated by tradition and religion,[287] or as a way to insulate the tribe from invasion by outsiders.[288]

The vast spectrum of legal systems and practices found within Indian tribes is ignored in the illiberalism literature that uses Indian tribes to bolster claims for greater governmental intervention in internal tribal affairs. Despite this fact, some of these theorists are willing to endorse coercive third-party intervention, relying on the assumption that the United States Supreme Court has the legitimate authority to overturn any decisions of tribal courts which seemingly violate individual rights.[289]

In particular, the claim that illiberalism flourishes within Indian tribes – a claim which, this article contends, grossly over-relies on the widely known example of the Santa Clara Pueblo's membership rule[290] — altogether fails to acknowledge the nuances of tribal governance systems. None of these scholars, for example, contend that liberalism's requisite protections for exit and dissent are unavailable in tribal communities. Consequently, the best solution offered for the perceived problem of rampant illiberalism within Indian tribes is to simply require that tribal cultures become mirror images of the dominant society.[291]

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[281] Riley, *"Straight Stealing," supra* note 239, at 96.
[282] *Id*.
[283] Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 484 (1998) (asserting that "[b]y 1947, 161 tribes had adopted constitutions under the IRA provisions.").
[284] *See* Goldberg, *supra* note **Error! Bookmark not defined.**, at 892 (citing to the tribal codes of the Navajo Nation and the Colville Nation who do not have written constitutions).
[285] *See, e.g.,* Porter, *supra* note 60, at 1605-06.
[286] *Id*. ("In many cases [the establishment of judicial systems] is completely novel, as traditionally the method for resolving disputes or adjudicating offenses was reserved to chiefs in council or other traditional governing institutions.").
[287] *See* Carpenter, *supra* note 171, at 1113-14 ("Moreover, tribal customs may dictate that religious and cultural traditions be kept confidential among members, clans, societies, or practitioners within the tribal community.").
[288] *Id*.
[289] KYMLICKA, *supra* note 7, at 166-67.
[290] Rosen, *"Illiberal," supra* note 15, at 829.
[291] For some scholars, this may be the desired result. *See, e.g*., JOSEPH RAZ, THE MORALITY OF FREEDOM 423-24 (1986), arguing that most indigenous cultures are inherently illiberal and

Short of such a suggestion, it is impossible to ascertain based on the illiberalism literature how federal courts should decide which tribal rules constitute "illiberal" violations that "buttress the hegemony of cultural elites" and which ones are palatable.[292] One example is instructive.

Consider the "culture war"[293] playing out across the United States, a battle that has not stopped at reservation borders. In the wake of a backlash in the dominant culture against equal rights for gays,[294] the Cherokee Nation of Oklahoma and the Navajo Nation – the two largest Indian tribes in the country – recently passed anti-gay marriage laws.[295] Interestingly, the Cherokee Nation did not outlaw gay marriage until after a gay Cherokee couple had applied for and received a marriage license.[296] The license was immediately challenged in tribal court, but,

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incapable of liberalization. Raz argues that the break-up of illiberal indigenous communities is the "inevitable by-product" of attempts to liberalize their institutions.

[292] Sunder, *Cultural Dissent*, *supra* note **Error! Bookmark not defined.**, at 504. *See generally*, Resnik, *Paideic Communities, supra* note 101, at 49 (posing her own compromise solution to the *Santa Clara Pueblo* case).

[293] *See Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (In referring to a battle characterized as the increasing toleration by the dominant society of deviant behavior, Scalia noted, "It is clear . . . that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.").

[294] In 2004, voters in 13 states were presented ballot measures seeking approval of constitutional amendments that would limit the institution of "marriage" as solely between a man and woman. The measures passed in all 13 states, in most cases by overwhelming majorities: 11 during the November 2nd general election (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah), and two in earlier primary elections (Louisiana and Missouri). In 2005, Kansas and Texas became the 18th and 19th states to amend their constitutions limiting marriage to same-sex couples. Initiative & Referendum Institute, University of Southern California Law School, *Ballotwatch, available at* http://www.iandrinstitute.org/ballotwatch.htm (last visited Feb. 19, 2006).

[295] In 2004, the Cherokee Nation Tribal Council unanimously passed a law banning same-sex marriages. *Cherokees Ban Gay Unions*, INDIAN LIFE, July 1, 2004, at 2, *available at* 2004 WLNR 5884017. On April 22, 2005, the Navajo Nation Council overwhelmingly passed the Diné Marriage Act of 2005 prohibiting same-sex marriages. Ryan Hall, *Same-Sex Marriages Not Recognized by Navajo Nation*, FARMINGTON DAILY TIMES, Apr. 23, 2005, at A1, *available at* 2005 WLNR 6499471. (Diné is the Navajo term for themselves. Anna Macias Aguayo, *Navajos Vote to Veto Gay-Marriage Ban*, ASSOCIATED PRESS, June 4, 2005, *available at* http://www.outinalbuquerque.com/home/news.asp?articleid=8848 (last visited Feb. 12, 2006).). On May 1, 2005, Navajo Nation President Joseph Shirley, Jr., vetoed the bill. Jason Begay, *Delegate Calls for Override of Gay-Ban Veto*, NAVAJO TIMES, May 5, 2005, *available at* http://www.thenavajotimes.com/. On June 3, 2005, the Navajo Nation Council overrode the President's veto. Aguayo, *supra* note 295.

[296] Dawn L. McKinley and Kathy E. Reynolds, a lesbian couple, applied for and received a Cherokee tribal marriage certificate in Tahlequah, Oklahoma, on Thursday, May 13, 2004. *Tribal Court Refuses Same-Sex Marriage Certificate*, CHEROKEE PHOENIX AND INDIAN ADVOC., June 30, 2004, at 4, *available at* 2004 WLNR 15184957. In order for the marriage to be formalized, the certificate had to be signed by the officiating officer and registered at the tribal courthouse. *Tribal Court Refuses Same-Sex Marriage Certificate*, CHEROKEE PHOENIX AND INDIAN ADVOC., June 30, 2004, at 4, *available at* 2004 WLNR 15184957. However, on Friday, May 14, the Chief Justice of the Judicial Appeals Tribunal (JAT), the Cherokee tribe's highest court, declared a 30-day

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after numerous appeals, the JAT – the highest appellate court of the Cherokee Nation -- recently ruled that the Tribal Council had no standing to challenge the order.[297] Accordingly, the Cherokee Nation is the first Indian tribe in the country to recognize (one) gay marriage.[298] Ironically, given that the American government denies the right of marriage to gays – and, in fact, President George W. Bush has vocalized support for a Constitutional amendment that would ban such marriages[299] – it is unclear whether a tribe that allows (or disallows) gay marriage is acting illiberally.[300]

Even if examples such as this – which highlight the definitional problems alluded to at the beginning of this article – are set aside, many other traditional tribal cultures and practices that go to the core of Indianness would be at risk if there were an expansion of the ICRA. "Illiberalism" within tribal communities is complicated and nuanced.[301] In some nations, women are preferenced above men.[302] In other tribes, the opposite situation prevails.[303] Some tribes have historically been

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moratorium on the registering or issuing of Cherokee marriage licenses. Donna Hales, *Cherokee Attorney Objects to Same-Sex Marriage License*, MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, June 12, 2004, *available at* 2004 WLNR 16042428. A month later, on June 14, the Cherokee Nation Tribal Council made a last minute addition to its meeting agenda and, despite complaints about procedural irregularity, *Council Bans Same-Sex Marriages*, CHEROKEE PHOENIX AND INDIAN ADVOC., July 1, 2004, at 6, *available at* 2004 WLNR 15124954, unanimously passed a law banning same-sex marriages. *Cherokees Ban Gay Unions*, INDIAN LIFE, July 1, 2004, at 2, *available at* 2004 WLNR 5884017.

[297] Donna Hales, *Cherokee high court dismisses latest attempt to block lesbian marriage*, MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, January 5, 2006, *available at* http://nl.newsbank.com/nl-search/we/Archives?s_site=muskogeephoenix&p_product=MTDB&p_theme=gannett&p_action=keyword.

[298] Adam Tanner, *Top US Indian Court Upholds First Gay Marriage,* ASSOCIATED PRESS (January 5, 2006), *available at* http://www.localnewsleader.com/brocktown/stories/news-00120412.html (last visited Feb. 19, 2006).

[299] "If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America." George W. Bush, *President Calls for Constitutional Amendment Protecting Marriage* (Feb. 24, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/02/images/20040224-2_d022404-1-515h.html (last visited Feb. 19, 2006); . Adam Nagourney & David D. Kirkpatrick, *Urged by Right, Bush Takes on Gay Marriages*, N.Y. Times, July 12, 2004, at A1 (noting that President Bush, under pressure from conservatives, escalated his support for a constitutional amendment banning gay marriage by moving the issue to the front of his presidential campaign).

[300] *See Lockyer v. City and County of San Francisco*, 95 P.3d 459, 499 (2004) (holding that same-sex marriages performed after local officials refused to enforce statutes limiting marriage only to heterosexual couples void and of no legal effect).

[301] As stated previously, I use the terminology of "illiberalism" only to address the claims of critics of tribal cultures. I strongly feel that many non-Western practices within tribal cultures are not, in fact, "illiberal" at all, but represent a communitarian ethic absent from many European cultures.

[302] *See supra* Part III.B.

[303] *Id*.

accepting of transvestite, or *berdache*, members.[304] Others have adopted the prevailing view of the majority society and are now banning gay marriage.[305] Many tribes retain traditional, pre-Columbian, theocratic structures,[306] while others mix church and state in the interest of furthering fundamentalist Christianity.[307]

These tribal laws and structures (among others) are protected against a full-scale attack by the dominant society through a continued recognition of tribal sovereignty and tribes' right of self-determination. There are two safeguards at work, functioning together to protect against the ICRA becoming an entirely pulverizing, assimilative force. First, as this article has demonstrated, the entire American Bill of Rights was not extended to Indian tribes through the ICRA. Thus, critical provisions of the American Bill of Rights – like the Establishment Clause – do not apply to tribal governments. An expansion of the ICRA could mean the end of this type of selective application.

Moreover, even in regards to those rights that were fully extended to tribes, it is well-settled that tribal courts need not interpret the ICRA "jot for jot" with federal courts.[308] In other words, Indian tribes are authorized and encouraged to apply the ICRA's provisions consistent with tribal values and traditions.[309]

If these safeguards were not present – if, for example, the ICRA applied the entire Bill of Rights to tribal courts, or if the door was opened for unadulterated federal court review of internal tribal decisions – Indian tribes would, in essence, be legally required to emulate the dominant society.[310] Such an expansion of the ICRA would likely

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[304] WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE (1986) (showing how anthropological fieldwork and historical research reveal some American Indian cultures venerated androgynous individuals classified as neither male nor female).

[305] Title 44 of the Cherokee Nation Marriage and Family Act was amended in 2004 to include a definition of marriage as "a civil contract between one man and one woman." *Cherokees Ban Gay Unions*, INDIAN LIFE, *supra* note 295. Navajo Nation Code now includes language stating that "Marriage between persons of the same sex is void and prohibited." 20TH NAVAJO NATION COUNCIL, RESOLUTION OF THE NAVAJO NATION COUNCIL, CAP-29-05, (copy on file with author).

[306] *See supra* PART III.B.1 and *infra* PART IV.C.

[307] Becky Johnson, *Cherokee Ten Commandments Move Above Federal Law*, SMOKY MOUNTAIN NEWS, September 21, 2005, available at http://www.smokymountainnews.com/issues/09_05/09_21_05/fr_cherokee_commandments.html.

[308] Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina,* 17 AM. INDIAN L. REV. 109, 120 (1992) (stating that Congress chose a balanced approach in enacting the ICRA, extending portions of the Bill of Rights, but not requiring that they be interpreted "jot for jot" in tribal courts); *Santa Clara Pueblo*, 436 U.S. at 57.

[309] *Santa Clara Pueblo*, 436 U.S. at 57.

[310] Wunder, *supra* note 69, at 4 (stating that, in 1968, tribes saw passage of the ICRA as a "renewed threat to tribal sovereignty" and feared "that tribal ways of life were about to come to an end . . . and that "[t]he very nature of Indianness was at stake.").

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destroy theocracies, traditional property rights, sacred ceremonies and religious practices, as well as indigenous justice systems. Given that this article argues against the use of the Santa Clara Pueblo's rule as paradigmatic of Indian illiberalism, but nevertheless concedes the existence of other practices within some Indian tribes that do not directly emulate those found in the dominant culture, further discussion of a few examples is in order.

A. Indigenous Justice Systems

The facet of tribal life most vulnerable to destruction as a result of an expansion of the ICRA is that of indigenous justice systems. In fact, testimony and debate surrounding passage of the ICRA indicates tribal leaders' concern at the time that such systems would be wiped out by an expansion of the Indian Bill of Rights.[311] Protecting traditional tribal dispute resolution methods was at the heart of tribal leaders' testimony during discussions on the proposed bill.[312]

Significantly, though many tribes have developed adversarial, Anglo-style courts for resolution of disputes,[313] a large minority still maintain traditional forms of dispute resolution.[314] These may include talking circles,[315] restorative justice methods,[316] or concentration on consensus building.[317] Such forms of problem-solving may be seen as denying democratic rights to members if these practices do not employ methods envisioned by the Constitution, even if based on "certain time-honoured procedures ensuring consensual decision-making."[318]

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[311] Commission Report at 8-9, citing Rights of Members of Indian Tribes: Hearing Before the Subcomm. On Indian Affairs of the House Comm. On Interior and Insular Affairs, 90th Cong. 2d Sess. at 127 (1968) (statement of John S. Boyden) [hereinafter *Commission Report*].

[312] *Id.*

[313] *See* McCarthy, *supra* note 283, at 486 ("There were 119 tribal courts as of 1978. Ten years later, the number had increased to about 150, handling an estimated 230,000 cases annually. The growth in tribal judiciaries in the most recent decade has been astounding. Today, of the more than 500 federally recognized tribal governments, virtually all have some system of civil dispute resolution and most have criminal court systems."); *see also*, The Citizen Potawatomi Nation's Website, at http://www.potawatomi.org/Government/Judicial/default.aspx (last visited January 18, 2006) ("The Citizen Potawatomi Nation Tribal Court is comprised of seven Supreme Court Justices, three District Court Judges, A Prosecuting Attorney, a Public Defender, a Court Clerk, and a Drug Court Coordinator.").

[314] McCarthy, *supra* note 283, at 486.

[315] JUSTICE AS HEALING: INDIGENOUS WAYS 111 (Wanda D. McCaslin ed., 2005).

[316] *See* Riley, *"Straight Stealing", supra* note 239, at 96 (explaining that the Navajo Nation's Peacemaker Court utilizes "traditional mediation methods").

[317] Alex [see books]

[318] KYMLICKA, *supra* note 7, at 39.

Testimony by tribal leaders emphasized the inconsistencies between the Anglo and Indian world views and their respective perspectives on justice. The Ute and Hopi Tribes, for example, highlighted some of these conflicts:

> The defendants' standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the United States. When requested to enter a plea to a charge the Indian defendant, standing before respected tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of 'white man's justice', guilty persons entering please of not guilty merely to throw the burden of proof upon the prosecution. From their viewpoint it is not an elevating experience. We are indeed fearful that the decisions of Federal and State Courts, in the light of non-Indian experience, interpreting 'testifying against oneself' would stultify an honorable Indian practice . . . .[319]

The imposition of jury trials onto tribes was also contested. The Pueblos viewed this practice with skepticism, contending that "it [was] no more logical to use a jury system for the settlement of internal matters within the extended 'family' that makes up a pueblo than it would be to use a similar system within the framework of an Anglo-American family as a means for enforcing internal rules or resolving internal disputes."[320] Other tribes, such as the Hopi and Ute, felt similarly about the jury trial requirement, noting that jury trials, though available in tribal court, were seldom invoked by defendants. "Many accused Indian people feel they do not need a jury of peers to determine the facts already within the knowledge of the accused. The defendant enlightens a credulous court."[321]

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[319] *Commission Report*, *supra* note 311, at 8-9.
[320] *Id*. at 9 (testimony of Domingo Montoyo, Chairman of the All Indian Pueblo Council of New Mexico.)
[321] *Id*. (statement of John S. Boyden).

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Statements by tribal leaders also emphasized the differences between adversarial systems of justice and conceptions of justice within tribal nations.[322] In fact, even though the Navajo Nation had established a nontraditional court system decades before passage of the ICRA, leaders testified that they still believed that Navajo language and tradition was inconsistent with justice in the Anglo world.[323] One speaker testified that, in contrast with the Anglo system, Navajo conceptions of fairness and social harmony meant that disputes be resolved by involving all members of the community, including elders and those who knew the history of the dispute.[324] Everyone was allowed to speak. If private discussions with elders or decisionmakers would help bring peace to the community, this, too, was acceptable.[325] He noted that "[i]t was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case, and where who can speak and what they can say are closely regulated."[326]

In the end, these Indian leaders also questioned the assumption on the part of Congress that Anglo justice systems are superior to Indian ways. One leader asked of Congress:

> Void of guile, the Indian inquires, do we not have inalienable rights to be protected as our customs and traditions require? Or must we relin[q]uish our right to self-government and submit to an alien code of the reasoning that someone else knows better than we the safeguards of our sacred rights? . . .[327]

Another leader spoke eloquently about the destruction of indigenous justice systems by the dominant culture:

> I regret that the outside world has never recognized that Navajos were functioning with sophisticated and workable legal and political concepts before the American

[322] *Commission Report*, *supra* note 311, at 10 (citing Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights, Washington, D.C., Jan. 23, 1988, Exh. 11 at 266, 269-70 (written statement of Robert N. Clinton, Professor, University of Iowa College of Law)).
[323] *Id*. at 11 (citing Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 229 (1989)).
[324] *Id*.
[325] *Id*.
[326] *Id*.
[327] *Commission Report*, *supra* note 311, at 127 (Statement of John S. Boyden).

> Revolution. I regret even more that the ways in which we are different are neither known nor valued by the dominant society. Because we are viewed as having nothing to contribute, much time has been wasted. Let me be more specific. Anglo judicial systems now pay a great deal of attention to alternative forms of dispute resolution. Before 1868 the Navajos settled disputes by mediation. Today our Peacemaker Courts are studied by many people and governments. Anglo justice systems are not interested in compensating victims of crime and searching for ways to deal with criminal offenders other than imprisonment. Before 1868 the Navajos did this. Now Anglo courts recognize the concept of joint custody of children and the role of the extended family in the rearing of children. Navajos have always understood these concepts . . . We could have taught the Anglos these things one hundred and fifty years ago.[328]

These statements may be over forty years old, but they still ring true today. As Professor Alexander Tallchief Skibine has argued, opening up tribal court decisions on purely intra-tribal matters to federal court review would place every aspect of tribal governance under scrutiny.[329] This would mean that all facets of Indian life – from membership decisions, election disputes, and the freedoms of speech and religion – would be dictated by the federal bench.[330] If that were to happen, the intentionally limited review authorized by the ICRA – a narrow statutory reading affirmed by *Santa Clara Pueblo* – would be entirely thwarted and "[t]he tribes and their tribal courts would become federal instrumentalities."[331]

B. Traditional Gender-Based Systems of Governance

The gender roles maintained in some tribal communities would appear, at first glance, wholly incompatible with liberal conceptions of equality. This is because, in some tribes, roles for men and women are

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[328] *Commission Report*, *supra* note 311, at 11 (citing Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227 (1989)).
[329] Alexander Tallchief Skibine, *Julia Martinez, Petitioner v. Santa Clara Pueblo Respondents*, 14 FALL KAN. J. L. & PUB. POL'Y 79, 87 (2003).
[330] *Id*.
[331] *Id*

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complementary and equal, but, nevertheless, fixed and immutable.[332] In the Tonawanda Band of Seneca Indians, for example, there are eight "clans": the Snipe, the Heron, the Hawk, the Deer, the Wolf, the Beaver, the Bear, and the Turtle.[333] Each clan appoints a Clan Mother – which, by definition, must be a woman -- who in turn appoints an individual to serve as the Chief – who is required by tribal law to be male.[334] The Clan Mother retains the power to remove a Chief and, in consultation with members of the clan, provides recommendations to the Chief on matters of tribal government.[335] The Clan Mothers cannot disregard the views of the clan, nor can the Chiefs disregard the recommendations of the Clan Mothers.[336]

The Seneca model of governance is seen elsewhere in Indian communities. In traditional tribal cultures, gender was commonly utilized as a way of organizing the world. Today, some tribes still employ tribal structures where membership status or inheritance rights are based on matrilineal or matrilocal systems.[337] In the Onondaga Nation, the rights and status of tribal males are subject to the Onondaga Faithkeepers' authority. The Faithkeepers are selected, appointed by, and accountable to the Clan Mother.[338] Men can neither vote for these leaders, nor are they allowed to have their non-member spouses reside on tribal land.[339]

The Navajo Nation, as well, defines most legal rights of members by the mother's clan.[340] Several of the Hopi tribes maintain similar rules. At Hopi Pueblo, each Hopi village has its own lands, and these lands are assigned to that village's matrilineal clans.[341] Within the clans, fields are assigned to the women of the clan and are later passed down matrilineally.[342] At Hopi-Tewa, too, land is held by the clans, but

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[332] Valencia-Weber, *Racial Equality*, *supra* note 63, at 372.
[333] *Poodry*, 85 F.3d. at 877.
[334] *The Winds of Change: A Matter of Promises* (PBS Video 1990) (providing an informative presentation on this Onondaga law and presenting two other tribes and their form of cultural governance) [hereinafter *Winds of Change*].
[335] *Id.*
[336] *Poodry*, 85 F.3d. at 877.
[337] *Winds of Change, supra* note 334.
[338] *Id.*
[339] *Id.*
[340] Krakoff, *supra* note 159, at 1138 (citing to Res. of Navajo Tribal Council CF-9-80 (1980)). In fact, the Navajo Nation has actually gone farther than the United States in regards to affording formal equality to women, and has adopted an equal rights provision. *Id*.
[341] *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1558, 1588-89 (2001) (discussing the ownership schemes of the Hopi, among other tribes).
[342] *Id.*

women are the actual owners of the land and the houses.[343] Once again, ownership rights descend through the mother's line.[344] All such gender-based systems – and thus, the essence of some ancient tribal cultures -- would be wiped out if there was an expansion of the ICRA into Indian Country.

C. Theocratic Tribal Governments

Indian theocracies also would be destroyed if the U.S. Bill of Rights' Establishment Clause was imposed upon Indian tribes. This is because some tribes – in particular, those that maintain pre-contact religions – are by their nature religious bodies.[345] That is, the government operates as a theocracy and leaders are chosen because they hold highly revered religious positions in the tribe.[346] In such societies, all aspects of tribal life – governance, social structures, tribal justice systems and culture – are infused with religious meaning.[347] Thus, if tribes were not allowed to establish religions – meaning that religion and governance could not mix – these particular tribal societies would cease to exist.[348]

I have given here only a few examples of how traditional indigenous life would be threatened, if not altogether destroyed, by the imposition of the entire Bill of Rights onto Indian tribes and corresponding federal court review of intra-tribal matters. But there are many other facets of indigenous culture that would be at risk. If federal courts interpreting the ICRA held that indigenous lifeways violated the United States Constitution – which, presumably, they would – indigenous cultures would be devastated. Indian tribes and tribal governments would be forced to become mini-models of state and local governments. Then, the process of colonization will be complete.[349]

I do not mean to ignore the possibility that the full assimilation of Indian peoples is, in fact, what critics arguing for federal judicial

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[343] *Id*.
[344] *Id*.
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[349] Frank Pommersheim & Shermann Marshall, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 420 (1992). *See* Robert Odawi Porter, *The Inapplicability of American Law to Indian Nations*, 80 IOWA L. REV. 1585, 1623 (2004) ("Promoting the illegal application of American law within the Indian nations furthers the colonization and incorporation of Indigenous peoples into American society and thus jeopardizes their future as distinct societies.").

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intervention in tribal communities desire. The destruction of Indian culture has long been the goal for activists situated all across the theoretical and political spectrum. Take one example. The Dawes Act of 1887,[350] which broke up communally held tribal lands and caused massive cultural devastation within many tribes, was, in significant part, the result of advocacy on the part of so-called "Friends of the Indian."[351] Convinced that the civilizing force of private property ownership combined with Christianity would save the Indians, these "friends" advocated for and pushed into law the allotment policy.[352] Still today, allotment is deemed one of the most devastating pieces of legislation ever to be enacted in regards to tribal peoples.[353] And the Dawes Act

[350] Act of Feb. 8, 1887, ch. 119, 24 Stat. 288 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348,49, 354, 381).

[351] Henry L. Dawes, *Solving the Indian Problem* (1883), *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY FRIENDS OF THE INDIAN 1880-1900 (Frances Paul Prucha, ed., 1973). *See* Kenneth Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1565 (2001) (noting that the "Friends of the Indian" who advocated for and pushed for passage of the Dawes Act were "sure in their Christian righteousness" and "had a messianic faith in the civilizing force of private property.")

[352] *Id*.

[353] President Theodore Roosevelt stated: "The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 19 (1987) (Wilkinson states, "Allotment . . . devastated the Indian land base, weakened Indian culture, [and] sapped the vitality of tribal legislative and judicial processes."); Former Principal Chief of the Cherokee Nation of Oklahoma, Wilma Mankiller, says of allotment: What happened to us at the turn of the century with the loss of land, when our land was divided out in individual allotments, had a profound irreversible effect on our people.... When we stopped viewing land ownership in common and viewing ourselves in relation to owning the land in common, it profoundly altered our sense of community and our social structure. And that had a tremendous impact on our people and we can never go back." Wilma Mankiller, in The Native Americans, TBS (1992); *See also* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 137, 1180 (1990) ("Allotment, arguably the most disastrous federal policy ever adopted for peaceful tribal Indians, destroyed most of the Indian land base."); Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 449 (2002-03) (Allotment's impact on community held land and important sacred and cultural sites opened the door for the eventual destruction of tribal life-ways."); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1656 (2000) ("The Allotment Policy was part of an intensive federal policy of assimilation designed to break down tribal structures and institutions and supplant these with Anglo American forms of governance.").

does not stand alone.[354] The desire of outsiders to save Indians by way of destroying them is not new to indigenous peoples.[355]

Despite their critique of tribal cultures, however, most liberal theorists – including many whose work I have discussed here -- nevertheless evidence a belief that liberal cultures ought to tolerate nonliberal groups, as long as certain minimum protections are satisfied.[356] Specifically, as long as exit and dissent are available, most liberal theorists contend that illiberal groups ought not be forced to become liberal.[357] This is because a person's ability to associate with the group of her choosing is believed to enhance both individual autonomy and personal freedom, core tenants of liberalism.[358]

It is important to emphasize again that scholars producing the illiberalism literature are not alleging that exit and dissent are prohibited

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[354] Other federal laws, like the Major Crimes Act, were purportedly enacted to "save" Indians, but very often with devastating consequences. *See, e.g*., Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 808-09 (2006) (arguing that the Major Crimes Act, which extended federal jurisdiction over certain enumerated crimes within Indian Country, arose out of the United State's "duty of protection" to Indians, but was, at heart "an extension of authority over a subjugated people at the time of their greatest weakness and political dependence on the United States. In other words, it was a simple and straightforward act of colonization.").

[355] *See, e.g.,* Lorie M. Graham, *"The Past Never Vanishes:" A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 10-18 (1998) (describing the federal government's and missionaries' attempts to Christianize Indian children by removing them from their homes and installing them in federal boarding schools where they had religious and other instruction designed to "Kill the Indian and Save the Man.").

[356] *See, e.g.,* JOHN RAWLS, THE LAW OF PEOPLES 61-62 (1999) (arguing for "due respect" by liberal peoples of "decent" nonliberal peoples—where decency is evidenced by respect for basic human rights—because the decent nonliberal society may become more liberal on its own as a result); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989) (for a comprehensive argument justifying multicultural accommodation); Chandran Kukathas, *Cultural Toleration*, in ETHNICITY AND GROUP RIGHTS 78 (Ian Shapiro & Will Kymlicka eds., 1997) (arguing that a state should not grant a 3rd party's demand that a group change its cultural practices, even if group members' rights are being violated internally, because such a demand would amount to "intolerance and moral dogmatism").

[357] *See, e.g.,* BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 148 (2001) ("[G]roups should have the utmost freedom to handle their affairs in accordance with the wishes of their members," on condition that members are adults who are capable of making voluntary decisions and who are permitted to leave the group at will.); Mark D. Rosen, *"Illiberal" Societal Cultures, Liberalism, and American Constitutionalism,* 12 J. CONTEMP. LEGAL ISSUES 803, 829-830 (2002) ("[I]lliberal communities ought to be able to pursue 'illiberal' policies that are affirmative manifestations of their cultural commitments, even if those policies socialize their members. What the communities cannot do is target dissenters, interfere with their reformist efforts, or occlude the conditions that allow for internal dissent."); Chandran Kukathas, *Are There Any Cultural Rights?,* 20 POL. THEORY 105, 133 (1992) (defending the right of minority cultures to impose internal restrictions on their members, so long as members have a right of exit).

[358] *See*, Hanoch Dagan and Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 567 (2001) ("Exit is a bedrock liberal value."); Madhavi Sunder, *Cultural Dissent,* 54 STAN. L. REV. 495, 536 (2001) ("[The] framework of voluntary association coupled with a right to exit arguably enhances individual liberty by providing individuals with a diversity of options among communities.").

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or thwarted within Indian communities. In fact, at least in regards to opt-out rights, support for *Poodry*-like outcomes indicates liberal theorists' dissatisfaction with too much exit, not too little. But, even when individuals are excluded from tribal membership, there is evidence that, in some instances at least, tribal communities endeavor to offer support (monetary and otherwise), and to keep even un-enrolled Indians integrated in tribal life.[359]

With over 500 Indian tribes in the United States, it is imprudent to generalize as to whether the freedoms of exit and dissent are, in fact, available in all tribal communities.[360] But it is clear that many liberal scholars – including those advocating assimilation and cultural destruction – have ignored the vast and substantial changes that are occurring within Indian nations. Many Indian tribes – like indigenous peoples all over the world – are undergoing a process anthropologist Marshall Sahlins calls the "indigenization of modernity." That is, Indian tribes are not seeking to insulate their "timeless" cultures from modernity, but are striving to maintain meaningful forms of cultural difference rooted in tradition and the natural world to which they feel a strong attachment.[361] Often, they seek to live separate and apart from the dominant society and to be free to maintain their social and cultural differences.[362] While this does mean securing "a negotiated distance from modernity,"[363] indigenous groups are not attempting to wholly insulate tribal cultures from the threat of change as some have claimed.[364] Rather, they merely insist upon exercising a political voice against the marginalization and oppression historically brought on by modernity.[365] This so-called "indigenization of modernity"[366] means that indigenous peoples desire to draw on certain aspects of modern life to revitalize and perpetuate their cultural identities.[367] Indigenous groups make "traditional" claims to negotiate their own place within the modern

[359] The children of Julia Martinez, for example, continued to participate in the religious and cultural life of the Pueblo after the case was decided. They also secured health benefits – initially denied by the Indian Health Service for lack of tribal enrollment – through the Bureau of Indian Affairs. Both Julia Martinez and her husband Myles (Navajo) remained affiliated with the Santa Clara Pueblo until their deaths. Several of their children still live there. Bethany Berger, *Indian Policy and The Imagined Indian Woman*, 14 KAN. J. L. PUB. POL'Y 103, 112 (2004).
[360] *See supra* note 18.
[361] Coombe, *supra* note 11, at 133.
[362] *Id*.
[363] *Id*.
[364] *Id.*
[365] *Id*. at 127-28
[366] *Id*. at 133 (citing Marshall Sahlins, *What is Anthropological Enlightenment? Some Lessons of the Twentieth Century*, 28 ANN. REV. ANTHROPOLOGY, at i (1999)).
[367] *Id*. at 133.

world, as they seek to develop their cultures and economies consistent with culturally specific values and practices.[368] History has shown, in fact, that it is indigenous peoples' unique ability to meld the traditional and the modern that has facilitated their continued existence.

The fusion of the traditional and modern within indigenous communities is evident. Take an example relevant to the concerns raised by *Santa Clara Pueblo*. Today, Indian tribes are electing more female leaders than any time since contact with Europeans. In the past twenty-five years, the number of women serving as top tribal leaders has nearly doubled.[369] Since 1999, at least eleven women leaders became the first women elected to the principal post on their tribes' governing councils.[370] In fact, today women are prominent in all facets of tribal leadership, including occupying prestigious positions in tribal judiciaries.[371]

In many respects, it is the freedom of exit and dissent that is facilitating the indigenization of modernity. Today, many Indians move off the reservation or away from tribal communities for education or business experience, and then return home to help run tribal enterprises or engage in tribal government.[372] "Educated" Indians with MBAs, JDs, MDs and a host of other degrees are returning to Indian Country to help their communities. This juxtaposition of Anglo education and tribal traditions promotes the indigenization of modernity – allowing Indian cultures, like all cultures, to change as they are increasingly influenced by the outside, but in ways consistent with Indian beliefs and lifeways.

CONCLUSION

Political theorists have recently noted an increased desire on the part of contemporary liberals to impose liberalism on indigenous groups.[373] But, as I have endeavored to show, that would be a mistake. Despite claims of rampant illiberalism within tribal communities, the evidence

[368] *Id*.
[369] Monica Davey, *As Tribal Leaders, Women Still Fight Old Views*, NEW YORK TIMES, Feb. 4, 2006.
[370] *Id*.
[371] I am honored to be the first woman elected to the Supreme Court of the Citizen Potawatomi Nation. I join my Indian friends and colleagues – including Wenona Singel, Stacey Leeds, and Pat Sekaquaptewa, among others -- who proudly serve as female judges for their respective tribes.
[372] Anecdotally, I have many friends and colleagues who received their degrees at top educational institutions outside of Indian Country, but have returned home to work for their tribes.
[373] KYMLICKA, *supra* note 7, at 167.

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indicates that violations of civil liberties are, in fact, rare.[374] Thus, a blanket expansion of the ICRA onto Indian tribes – based largely on a misperception about tribal life fueled by one very public case – would be wholly unjustified.

Furthermore, such expansion would be devastating for indigenous communities. As I have demonstrated, Indian tribes vary dramatically in their governmental structures, cultures, and contemporary lives. As Congress understood when passing the ICRA, the federal courts are ill-equipped to differentiate between the hundreds of Indian nations and their respective practices and traditions. Forcing a one-size-fits-all approach to civil liberties onto Indian tribes would wipe out Indian differentness.[375] Not only because such an approach would ignore the differences between Indian tribes and the state and federal governments, but also because it would disregard the vast diversity between hundreds of Indian nations as well.

There is no doubt that Indian tribal governments owe responsibilities to their people. And those duties ought not be taken lightly.[376] But I contend that these issues are better addressed by tribes themselves, who can shape change in ways consistent with tribal values and traditions. This will enable Indian nations to continue their own processes of cultural evolution and growth. As indigeneity as a way of life is increasingly threatened by an encroaching dominant culture, it is critical that the federal government take no further steps to force the assimilation and eventual destruction of America's indigenous peoples.[377]

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[374] *See* Skibine, *supra* note 329, at 85 (stating that "all available evidence indicates that tribes have not violated the edicts of the ICRA.").

[375] Frickey, *supra* note 88, at 484 (noting that the Supreme Court's Indian law jurisprudence of late is evidence of its "either not recognizing or not caring that a one-size-fits-all solution should not be imposed on communities as radically varied as those composing America's Indian country.").

[376] The future of Indian peoples depends, also, on tribal governments maintaining functional, workable relationships with tribal members. *See supra* note _.

[377] *See generally*, Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 141 (2002) (contending that "[g]iven the extraordinary forces of assimilation that have been unleashed against our societies," if indigenous peoples do not choose a "distinct developmental path," they will eventually cease to exist).